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THE SHERMAN ACT AND THE NEW ANTI- TRUST LEGISLATION

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THE SHERMAN ACT AND THE NEW ANTI-TRUST
LEGISLATION. I

The recent additions to the federal legislation having to do with monopolies and trusts have followed upon three years of continued and vigorous discussion. In part, very likely, this general revival of interest in the control of the trusts was bound up with the growth of a general radical movement in politics, and more especially with the demand for a generally increased measure of government control of industry. But there is more than mere coincidence in the fact that this period of active public discussion followed immediately upon the decisions of the Supreme Court in the Standard Oil and American Tobacco cases. Before these decisions the Sherman act was a weapon which had never been fairly tested with respect to its efficacy for the purpose for which it was forged. But with its strength and its limitations at least partly uncovered, it became a fair target for criticism.

Not only were the undertakings directly affected by these decisions of great magnitude and with far-reaching affiliations, but, what is more important, each was precisely the sort of undertaking against which the statute was primarily directed. Whether or not labor organizations, railroad combinations, and price agreements affecting a limited area were intended to be covered by the condemnation of the law might afford some ground for debate,

but both the phraseology of the statute and the circumstances attending its enactment place its intent in regard to great industrial combinations beyond the possibility of a doubt. But not until the law had been on the statute books for over twenty years was its efficacy as a weapon against unified industrial consolidations—"trusts" of the modern sort—thoroughly tested in the Supreme Court.¹

Furthermore, the findings of the court were in themselves such as to renew interest in the statute and stimulate discussion. Especially is this true, of course, of the court's intimation that not all agreements in restraint of trade were prohibited by the statute. Extreme radicals found this state of affairs in itself unsatisfactory. Many others, whether radically minded or not, were disquieted by the opportunity for judicial legislation afforded by the necessity of drawing a line between legal and illegal combinations. There was also an excusable curiosity on the part of business men as to the legal status of existing business arrangements, including not only overt combinations but also a mass of secret trade agreements which would, in part at least, be brought to light if their legality were assured. And a similar interest attached to the possibility of introducing trade agreements into new and supposedly forbidden fields.

Along with this curiosity as to the exact extent of the field for business combination left unguarded by the apparently shrinking statutory barriers, there was an increased amount of apprehension and disquietude, especially on the part of the larger business combinations. For even if the law itself had been somewhat softened, its administration had been unprecedentedly vigorous. There have been not a few attempts to show that the vigor and pertinacity with which the law has been enforced have varied with the policies of different presidential administrations. Since the enactment of the law there has been a rapid but fairly steady increase in the

¹ The *E. C. Knight Co. (Sugar Trust)* case does not constitute a real exception to this statement, because of the narrow issue on which the decision of that case turned. None of the other so-called "trusts" involved in cases which reached the Supreme Court were more than combinations of independent undertakings held together by price agreements, pooling arrangements, or the employment of a common sales agent.

number of prosecutions and a yet more notable increase in the number of successful prosecutions. Nevertheless it would be going too far to attribute all of the difference to the relative apathy of the earlier administrations. The earlier decisions, especially in the cases of *In re Greene*¹ and *United States v. E. C. Knight Co.*,² were discouraging, and the development of adequate administrative machinery has been of necessity a slow process. At any rate, it is evident that the work of the public prosecutor in recent years has been carried on under more advantageous circumstances than it was twenty or ten years earlier. The successive decisions under the statute have indicated what are likely to be the more vulnerable aspects of the combinations attacked; mistakes and deficiencies in the preparation of some of the earlier cases have naturally been guarded against in the later. Moreover, whether or not a given combination falls under the condemnation of the statute is a matter of fact as well as of law, and the Department of Justice is much better equipped than formerly for uncovering the complex and frequently hidden facts in the case. Not until 1903³ was the immunity of witnesses from prosecution on account of matters testified to, which had been granted in 1893 so far as proceedings under the Interstate Commerce act were concerned, extended to witnesses in proceedings under the Anti-trust act. The establishment of the Bureau of Corporations in 1903 and the organization of the Bureau of Investigation in the Department of Justice in 1908⁴ made available a permanent staff of expert investigators. Not only have these bureaus been signally useful in the collection of evidence for the prosecution, but, what is quite as important, their investigations have indicated in advance whether a proposed prosecution under the statute might be undertaken with any hope of success.⁵ The government has been better equipped in recent years for the efficient enforcement of the Sherman law than ever before.

¹ 52 Fed. 104.

² 156 U.S. 1.

³ 32 U.S. Stat. 854. Mention should also be made of the acts of 1903 and 1910 to expedite hearings under the Sherman law (32 U.S. Stat. 823; 36 U.S. Stat. 854).

⁴ *Report of the Attorney-General*, 1909, p. 8.

⁵ *Ibid.*, 1910, pp. 2, 3, 26.

But it would not be fair to attribute all or even a major part of the recent interest in the amendment of the Sherman act to whatever dissatisfaction, uncertainty, and unrest were created by the interpretation and administration of the statute. There were indications that legislators and publicists had a more adequate appreciation of the real nature of the problems involved in the growth of industrial combinations than was the case twenty years before. That the Sherman law had apparently had but little effect in checking the movement toward industrial combination was in itself a fact demanding explanation and compelling, in a manner, a recognition of the complexity of the problem and the possibility of other ways of dealing with it.

Furthermore, it is significant that in much of the more serious discussion, both the analysis of the problem and the proposals of specific remedies involved the recognition of certain principles that for some years had been very generally accepted among economists. Specific instances of the direct influence of economic writing and teaching have not been lacking,¹ and it is fair to infer that through a process of gradual diffusion the indirect influence has been considerable.

There seems to have been a very general impression that the decisions in the Oil and Tobacco cases declared a new judicial policy in the application of the Anti-trust act; that "good trusts" were to be distinguished from "bad trusts"; that combinations might restrain trade providing they did not "unduly" restrain it; that possibly even price agreements were permissible, if the prices agreed upon were "reasonable." Much has been written upon these points, but because the significance of the recent supplementary legislation hinges in part upon the real bearing of these decisions, I think it worth while to review the matter again.

If the decisions in question are to be taken at their face value, the general impression that they opened the way for "reasonable"

¹ Although there are many who might be mentioned, special reference should be made to the influence of (1) Professor R. T. Ely's early and continued insistence upon the fact that mere size does not give sufficient advantage to be the basis of a lasting monopoly, and that where there is such monopoly there must be some definite source of monopoly power, and (2) Professor J. B. Clark's thesis that the only power for evil possessed by most of the trusts was the power of predatory competition.

price agreements and mildly repressive contracts and combinations in restraint of trade does not seem to have been well founded. The precedents from which in particular the new holdings were supposed to mark a departure are the decisions in the Trans-Missouri Freight Association and Joint Traffic Association cases. In these cases it was held in general terms that the Sherman law, referring as it does to "every" contract, etc., in restraint of trade, prohibits contracts and combinations in restraint of trade whether reasonable or not. The minority opinion in the Trans-Missouri case, written by the present Chief Justice and concurred in by three other justices, held that the phrase "restraint of trade" should be given its common-law meaning, under which not all contracts limiting the freedom of trade are deemed invalid as involving "restraint of trade."

But the issue as between the majority and minority opinions does not seem to have been squarely joined. It has been very generally overlooked that it was intimated in the majority holding in the Trans-Missouri case and plainly stated in the Joint Traffic case that certain kinds of contracts which involve in fact some restraint of trade but are not invalid under common law would not be held illegal under the statute.¹ From this it would appear that so far as the general statement of the principles of the law is concerned the division of the court was more apparent than real. But there was, however, some fundamental ground of disagreement, even if not clearly expressed, for these supposedly conflicting interpretations of the law were not offered as mere *dicta*, but in support of opposing opinions as to the legality of the particular combinations under consideration.

The specific question involved was whether a combination of railroads for the purpose of fixing and maintaining rates fell under the condemnation of the statute, if the rates fixed by the agreement were not shown to be in themselves unreasonable. In the dissenting opinion it was claimed, first, that such agreements among railroads were necessary and even desirable, hence not unreasonable and consequently not illegal, and, second, that the Sherman act was not intended to apply to railroads. The majority

¹ 166 U.S. 329; 171 U.S. 567.

of the court held, however, that neither of these contentions could be sustained in the face of the fact that the Sherman act condemns *every* combination in restraint of trade. The real ground of difference, I think, is to be found in the fact that, although both the majority and the minority of the court were agreed that some agreements which restrain trade are not condemned by the statute, they did not agree as to the general logical basis of such exceptions. The dissenting opinion held that "reasonableness" in the sense, apparently, of an absence of harmful economic or social effects is the ground on which exceptions should be made, while the majority of the court held (more clearly in the Joint Traffic case) that every agreement is illegal if its direct purpose is restraint of trade, while it may be legal if the restraint of trade is merely incidental to a contract made primarily for another and legitimate purpose, providing that the restraint of trade is no greater than is necessary to the protection of the legitimate purpose of the contract.¹ Both the majority and minority opinions claimed to be in harmony with common-law precedents. But this last is a matter too large for present discussion, and does not fall within the competence of the present writer.²

What the Trans-Missouri and Joint Traffic decisions virtually resolve themselves into is this: Certain classes, forms, or kinds of agreements, such as a partnership or an ordinary corporation formed by the union of former competitors, or the sale of the goodwill of a business on terms by which the seller agrees not to compete with the buyer, may "restrain trade," but because the main purpose of such combinations or contracts is legitimate, and the restraint of trade is only incidental, they will not be considered as restraints of trade under the statute. But where the *direct purpose* of a combination or contract is restraint of trade it will be deemed illegal even if the restraint is reasonable in the sense that

¹ 171 U.S. 567, 568. Cf. *Hopkins v. United States*, 171 U.S. 592-94.

² The majority opinion seems to be in harmony with the frequently cited summary of common-law precedents by Judge Taft in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 281, 282. In general harmony with the dissenting opinion is Mr. Bruce Wyman's thesis that the public interest rather than the hard-and-fast rule of the maintenance of competition is the ultimate criterion by which the common law tests the validity of contracts in restraint of trade. Cf. his *Control of the Market*, especially chap. vi.

it is not prejudicial to the public interest. The things thus distinguished have come to be known as "direct restraint" and "indirect restraint."

The court did not differentiate the meaning of "restraint of trade" in the statute from its common-law meaning by bringing under the inhibition of the statute any of the general classes or kinds of contracts or combinations which were valid under common law. But it did refuse to give to the statute the elasticity which the dissenting opinion held was to be found in the common law. By the statute Congress had, in the view of the court, established unrestricted competition as the declared public policy in such matters, and it was for Congress, not the court, to relax the rule if its rigid application were found to be undesirable. In short, all combinations and contracts entered into with the direct purpose of restricting competition in interstate commerce were held to be illegal, although it was still held, as in earlier cases, that agreements which "indirectly and remotely" affect interstate commerce were not covered by the act.

The doctrine thus established was followed in the Northern Securities case¹ and in a number of cases decided in the inferior courts.² In none of these subsequent cases, however, with the possible exception of the Northern Securities case, is there any clear indication in the decisions that the findings would have been for the defendants had it not been for the Trans-Missouri precedent. The rule established in that case may have simply afforded the courts a convenient means of narrowing the issues in subsequent cases, by ruling out at once the defense of reasonableness.

On the other hand, however, before the Trans-Missouri decision the lower courts had refused to apply the Sherman act to a number of combinations which clearly restrained trade in ways more direct than were indicated as permissible in the Trans-Missouri case. Certain price agreements, for example, were declared legal.³ After

¹ 193 U.S. 331.

² Representative cases are: *United States v. Coal Dealers' Association*, 85 Fed. 252; *United States v. Swift & Co.*, 122 Fed. 529; *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454; *Phillips v. Lola Portland Cement Co.*, 125 Fed. 593.

³ *United States v. Nelson*, 52 Fed. 646; *Dueber Watch-Case Manufacturing Co. v. E. Howard Watch & Clock Co.*, 66 Fed. 637.

the Trans-Missouri decision, agreements somewhat similar to these were declared unlawful.¹ It is fair to infer that the Trans-Missouri decision distinctly widened the actual field of application of the statute so as to include, moreover, cases involving particular issues quite distinct from those of the leading case.

✕ Turning now to the Standard Oil and American Tobacco cases, does there appear any clear evidence that the court's expressed intent to interpret the statute "in the light of reason" meant that the range of its applicability would be again restricted? No definite answer to this question can be given, of course, except in the light of subsequent decisions in border-line cases. The dictum in the Oil case, embodying in general terms the court's interpretation of the act, does not afford a satisfactory basis of inference.

Taking the decision at its face value, however, it does not seem to come to quite the same thing as the minority opinion in the Trans-Missouri case, although both were written by the present Chief Justice. In that dissenting opinion it was held without equivocation that only "unreasonable" contracts in restraint of trade were condemned by the statute, and it was urged that to construe the statute as excluding certain classes of contracts, such as those which are collateral to a sale of property, while at the same time stating that the statute covers every contract in restraint of trade, was illogical. Had this minority opinion prevailed, it would have given to the statute all the elasticity that could by the broadest interpretation be found in the common law. The courts would have been free to pronounce upon the legality of particular kinds of combinations according to their view of public policy. The determination of public policy would have been influenced, of course, by precedents, but many modern forms of combinations are too new, and precedents consequently too uncertain to have given necessarily and immediately any hard-and-fast rule of discrimination between permissible and illegal combinations. For better or worse, the road to judicial legislation would have been opened.

The Standard Oil decision did not explicitly state that only unreasonable contracts in restraint of trade were condemned by the

¹ *Ellis v. Inman, Poulsen & Co.*, 131 Fed. 182; *Loder v. Jayne*, 142 Fed. 1010; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 164 Fed. 803; 220 U.S. 373.

law. Its emphasis was on the thesis that the statute must be interpreted "in the light of reason," and that the "rule of reason" must be applied in determining whether a particular combination is within the scope of the law's condemnation. It is true that "undue" restraint of trade was specified as the thing prohibited, but the stress was not put on this point. There is nothing in the decision really inconsistent with the minority opinion in the *Trans-Missouri* case, but it went farther than that holding, in that it *identified restraint of trade with monopoly*.

It was pointed out that with the gradual narrowing of the older common-law definition of restraint of trade as any voluntary restraint put by an individual on his right to carry on his trade, and the accompanying broadening of the original technical meaning of monopoly so as to include engrossing, the two concepts restraint of trade and monopoly came to be blended. Interpreting the statute, then, as using common-law phrases with a common-law meaning, it was held that its first section, declaring contracts, combinations, and conspiracies in restraint of trade illegal, and its second section, making it illegal to monopolize or to attempt to monopolize any part of interstate trade or commerce, are mutually explanatory. "Undoubtedly," said the court, "the words 'to monopolize' and 'to attempt to monopolize' as used in the section reach every act bringing about the prohibited results."

If this joining of the first two sections of the act could be accepted as final, the definition of the word "monopolize" would be the only serious difficulty in the interpretation of the statute. The courts would be left free to determine whether a given restraint of trade is against public policy, but the standard by which public policy should be gauged would be definitely prescribed. In certain respects, at least, this hypothetical result may be taken as a description of the actual state of law. The particular form which a combination adopts counts for nothing either one way or the other. Its purpose and the methods used in attaining its purpose are the crucial facts. If "judicial legislation" means the determination of public policy in particular instances by the courts, the *Standard Oil* decision did not give it much scope.

And yet this is not all there is to the matter. There are important classes of cases to which the Sherman act has been held and is

still held to apply in which the presence or absence of monopoly or of monopolistic intent is not the determining factor. In other words, under the accepted interpretation of the statute, there may be "restraint of trade" where there is no "restraint of competition." Most of these cases have to do with interference with commerce on the part of labor unions.

In the Sherman act the common-law phrase "restraint of trade" became "restraint of trade or commerce among the several states, or with foreign nations." This and the fact that the act rests upon the federal power over interstate commerce have given a decided twist to its interpretation. The contracts in restraint of trade found in the early common-law cases were agreements by which an individual bound himself to refrain from pursuing a specified calling, and the evils involved were supposed to reside in the partial loss of the power of supporting one's self and of contributing to the welfare of the community. Later, agreements tending to limit or suppress competition as an efficient price-fixing force were also classed as contracts or combinations in restraint of trade. But, so far as I can find, the effect of such agreements upon the volume of commerce was never made the factor determining their illegality.

In one of the early cases under the Sherman act¹ it was held by the Circuit Court for the District of Massachusetts that the words "commerce" and "trade," as used in the statute, are synonymous:

Careless or inapt construction of the statute . . . will, if followed out logically, extend into very large fields, because . . . the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes or boycotts, and by every method of interference by way of violence or intimidation. It is not to be presumed that Congress intended thus to extend the jurisdiction of the courts of the United States without very clear language.²

But within a month another circuit court had granted an injunction against a combination of striking working-men on the ground that in refusing to work they were violating the statute by interfering with the movement of goods in interstate commerce.³ The opinions

¹ *United States v. Patterson*, 55 Fed. 605.

² 55 Fed. 641.

³ *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994.

in the cases arising out of the railway strike of 1894 contain explicit recognitions of their departure from common-law precedents. Thus, "The term 'restraint of commerce' was used in its ordinary, business understanding and acceptance."¹ Another statement is:

I am unable to regard the word "commerce," in this statute, as synonymous with "trade" as used in the common-law phrase "restraint of trade." In its general sense, trade comprehends every species of exchange or dealing, but its chief use is "to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail," and it is so used in the phrase mentioned. But "commerce" is a broader term . . . and, as used in this statute, . . . should not be given a meaning more restricted than it has in the Constitution.²

Even more specific is the following:

The primary object of the statute was, undoubtedly, to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another.³

For present purposes it is immaterial whether the logic of these opinions is sound, or whether the Sherman act was seized upon and distorted somewhat in order to meet a great emergency.⁴ But even if these interpretations of the scope of the act were not illogical, it cannot be held that they were in any sense necessary. Whether the statute was intended to apply to labor combinations may be a matter of doubt, but there is no evidence in the congressional debates that it was anticipated that the statute would prohibit interference with commerce as a thing distinct from restraint of trade. Of course these decisions make much of the use of the term "conspiracy" in the statute, but even if that word means in this

¹ *United States v. Elliott*, 64 Fed. 30.

² *United States v. Debs*, 64 Fed. 749.

³ *United States v. Cassidy*, 67 Fed. 705.

⁴ There may be some significance in the fact that the Supreme Court, in the only one of these cases which reached it (*In re Debs*, 158 U.S. 564), did not rest its findings upon the Sherman act, but on the general federal powers over interstate commerce and the transmission of the mails. But its subsequent opinions have been such as virtually to imply an approval of the broad scope given to the Sherman act by the lower courts in the railroad strike cases.

connection anything more than "combination,"¹ the decisions nevertheless really hinge upon the meaning attached to the word "commerce."

Similar in some respects are the decisions of the Supreme Court in two cases that should be sharply differentiated from most of the cases under the statute that have come before that body. In *Loewe v. Lawlor*² a boycott instituted by the Danbury Hatters' Union was held to constitute a conspiracy in restraint of interstate commerce. It was immaterial, said the court, that there was no suppression of competition, and it was even immaterial that there was no direct physical obstruction to the movement of commerce. It was sufficient that the boycott tended to check the free flow of goods from one state to another. In the recent case of *Eastern State Lumber Association v. United States*³ an arrangement by which the members of an association of retail lumber dealers were informed of the names of wholesale dealers who sold directly to consumers was held to be a similar restraint upon the movement of interstate commerce, although no suppression of competition was alleged.

Doubtless in many jurisdictions the actions condemned in these two cases would have been held to be offenses under the common law, but not because they "restrained trade" and certainly not because they interfered in any way with the general movement of commerce.

The fact seems to be that the Sherman act is held to apply to two very different classes of things. Interference with the movement of commerce is one thing, and suppression of competition is

¹ Justice Holmes held in his dissenting opinion in the Northern Securities case (193 U.S. 403) that "the words hit two classes of cases, and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade." Cf. *Rice v. Standard Oil Co.*, 134 Fed. 464. This point is reviewed in *Tribolt v. United States*, 11 Ariz. 436; 95 Pacif. 85.

² 208 U.S. 274.

³ 234 U.S. 600. The older case of *Montague & Co. v. Lowry*, 193 U.S. 38, turned partly upon similar considerations, although in that case the element of monopoly was not entirely absent. And in *United States v. Patten*, 226 U.S. 541, the court said: "Sec. 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraint, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein."

quite another thing. In point here is the extraordinary decision of the Circuit Court of Appeals in *Whitwell v. Continental Tobacco Co.*,¹ which held that under a correct interpretation of the second section of the act "no attempt to monopolize a part of commerce among the states is made illegal or punishable unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states." Probably this decision (which refused to see in an attempt to monopolize by the use of a factor's agreement of the most flagrant sort any evidence of the violation of the act) would not now be accepted as good law. But it draws a sound distinction between the suppression of competition and the hindering of the movement of commerce. Few economists would care to maintain that competition would always have the advantage over monopoly in respect to the volume of commerce it would create. It seems then that, despite the language of the Standard Oil decision, the identification of "restraint of trade" and "monopolizing" or "attempting to monopolize" is not complete. The Sherman act, as at present interpreted, condemns two very different sorts of offenses.

The Sherman act is a general statute, declaratory of public policy. As such it must be judged, it seems to me, by (1) the soundness of the public policy which it declares, (2) the accuracy and completeness with which it declares that public policy, and (3) the adequacy of the mechanism which it provides for making that public policy effective. What more I have to say in this first paper will have to do with these three aspects of the statute.

1. There can be little doubt but that the public policy which the act was intended to embody is that competition should be maintained, artificial monopoly destroyed, and its growth prevented. In the congressional debates attending its enactment the great industrial combinations of the day were singled out by name as the things against which it was directed. And it is clear from the debates that the hostility toward these industrial combinations was especially directed against (1) their supposed power over prices and (2) their aggressive suppression of competition. Whatever the economic advantages of monopoly *per se* may be, there will be little

¹ 125 Fed. 454.

question of the soundness of the policy which would attempt to deprive it of its power for evil in these two particulars.¹

But it is often urged that to attempt to maintain competition by prohibiting attempts to monopolize is illogical, since monopoly is the goal of competition, and achieved monopoly is merely the result of thoroughly successful competition.² The aim of each competitor is to aggrandize his own business at the expense of his rivals, and just so far as he leaves his rivals in partial possession of the field he falls short of complete success. The simplicity of this reasoning makes it attractive, but it is too simple to fit the facts of the case. We need not discuss at this point the pertinent question as to whether a permanent industrial monopoly can be achieved by the use of permissible competitive methods by a business not enjoying any special advantages not open to its competitors aside from the possession of a larger amount of capital, for the matter can be disposed of in a simpler fashion. There is a substantial difference between competing and "attempting to monopolize" in purpose and consequently in methods. The ordinary competitor, it will be conceded, does not have the establishment of monopoly in mind

¹ Most of the more weighty discussions of the economic advantages of monopoly have to do with the effect of monopoly upon the aggregate production of wealth measured in terms either of subjective satisfaction or of objective commodity units. Even from this point of view the case for monopoly is exceedingly dubious and, at best, has a validity that is restricted and conditioned in many ways. Moreover, such considerations are relatively unimportant compared with matters like the effect of monopoly upon distribution, upon the scope for individual initiative, upon economic opportunity in general, and upon a host of social and political relations. In short, it is a question less of the relative "economy" of monopoly or competition than of the kind of economic organization best calculated to give us the kind of society we want. Until our general social ideals are radically changed, it will take more than economic analysis to prove that it would be sound public policy to permit monopoly in that part of the industrial field where competition is possible.

² Such was the opinion of a number of witnesses before the Senate Committee on Interstate Commerce, 62d Congress. See for example the Hearings pursuant to Sen. Res. 98, pp. 1431 ff. The latest of the very few expressions of similar views by economists is to be found in Professor R. L. Liefmann's article entitled "Monopoly or Competition as the Basis of a Government Trust Policy," *Quarterly Journal of Economics*, XXIX, 308 (February, 1915). For a judicial opinion to the same effect, see *Whitwell v. Continental Tobacco Co.*, 125 Fed. 462, where it was even held that "every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation." In general, however, this misuse of the word "monopolize" has no better standing in law than it has in economics.

as an end. He strives to increase his profits by increasing his trade, and in so doing he usually endeavors to acquire as much as he can of the custom enjoyed by his competitors. But the thing directly sought is such increase of his profits as is possible under competitive conditions. The effect of his policies on his competitors is secondary and, generally speaking, indirect. The phrase "attempting to monopolize" on the other hand is meaningless if it does not refer to conscious efforts to get rid of the limitations which competition sets upon one's ability to buy and sell at such prices and on such terms as one pleases. The elimination of competition through the absorption or crippling of competing establishments becomes the direct and primary object, and the methods used are adapted to this end. The contention that "to compete" and "to attempt to monopolize" are synonymous is clearly unsound. They are definitely antagonistic in principle.

2. Is the Sherman act an accurate expression of the public policy which it seeks to declare? If by accuracy is meant precision, it has little of it. It was, in its inception, a lawyer's statute, speaking in the language of the common law. It was drafted by the Judiciary Committee of the Senate as a substitute for the Sherman bill, which, together with a mass of proposed amendments, had been referred to that committee. These amendments included various lists of particular offenses and various delimitations of the precise field of application. It was evident that it would be difficult for Congress to come to an agreement on any one set of particularizations. Moreover, the general phrases of the Sherman act were chosen intentionally, we are told by one of its framers, in order that the responsibility of determining its exact scope might be left to the courts.¹ For seven years its interpretation was uncertain. The decisions in the lower courts were conflicting, and the Supreme Court's holdings purely negative. Nor did the *Trans-Missouri* decision help matters much. The words "restraint of trade" still remained to be defined, and in the next thirteen years the work of definition progressed only so far as the

¹ George F. Edmunds, "The Interstate Trust and Commerce Act of 1890," *North American Review*, CXCV, 801 (December, 1911). Cf. A. H. Walker, *History of the Sherman Law*, chap. i, ii; and O. W. Knauth, *The Policy of the United States towards Industrial Monopoly*, chap. i.

particular cases decided were typical of classes of possible cases. The standard of public policy announced in the Standard Oil decision was the first general criterion of the scope of the act. There is nothing in subsequent decisions which indicates any tendency on the part of the court to depart from that standard.

With restraint of trade held to be the general equivalent of monopolizing and attempting to monopolize, there is small doubt that the present interpretation of the statute is in harmony with the purposes which were in mind at the time of its enactment. The great industrial combinations against which it was hoped that the statute would be efficacious have for the most part a more thoroughly unified and compact form than they had in 1890. Whether such consolidations are contracts, combinations, or conspiracies in restraint of trade within the meaning of the common-law terms may be a matter of doubt.¹ But there is now no question that, if their purpose is monopoly, they come within the condemnation of the Sherman act. Nor does it appear that in any unimportant respects the statute has been weakened. There is no reason to think, for example, that price agreements and agreements to restrict output, whether of local or of general scope, are not as illegal now as they have been at any time.²

As a general expression of the public policy which it is supposed to embody, the Sherman act is adequate. The difficulty is that it goes too far. In the first place, as we have already seen, it is so worded that it is used as a weapon against strikes, boycotts, and other concerted efforts to interfere with the conduct of any business

¹ Cf. the argument of Justice Holmes to the effect that under the common law contracts in restraint of trade are contracts with strangers to the contractor's business, and that combinations and conspiracies in restraint of trade have the purpose of keeping strangers to the agreements out of business. (*Northern Securities Co. v. United States*, 193 U.S. 404, 410.)

² The following extract from the opinion of the Circuit Court in the "bath-tub trust" case is directly in point: "Some men believe that price agreements should be sustained by the courts, unless they are shown to be against the public interest. Others hold that they may be permitted only when it is affirmatively shown that they promote the public interest. Still others say that a price agreement pure and simple is always illegal. That the Supreme Court has declared the last of the above-stated contentions to be the law is conclusive here."—*United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 182. See also the decision of the Supreme Court in the same case, 226 U.S. 20, and *Straus and Straus v. American Publishers' Association*, 231 U.S. 222.

undertaking which ships its goods across state lines or to other countries. These things may be undesirable; very likely some of them are. But they are so far out of line with the other things condemned by the Sherman act, and in most instances have so little relation to "monopolizing," that the Sherman act ought to be so amended as to cut them out of the list of offenses which it condemns.¹ In some cases they clearly run counter to current conceptions of public policy. In other cases this is not so clear. At any rate, if federal law is still to condemn all or some of these things it should take the form of separate and carefully drawn statutes. Moreover, practices like those condemned in the Eastern States Lumber Association case, mentioned above, probably fall within the jurisdiction of the new Federal Trade Commission.

In the second place, the application of the Sherman act to railroads is inconsistent with the standards of public policy embodied in the Interstate Commerce act. We regulate railroad rates and services on the assumption that railroads are natural monopolies, and that combinations or rate agreements are inevitable. But at the same time we condemn railroad combinations and rate agreements, and (as in the New Haven case) bring criminal indictments against the men responsible for such combinations.² From railroads we exact the observance of two mutually inconsistent standards of morality. The real evils in railroad combinations are matters of corporation finance and of the equilibrium of the equities of various sorts of bondholders and stockholders. These evils should be dealt with by statutes appropriate to the purpose, and the Sherman act should be so amended as to be relegated to its proper field of preventable industrial "monopolizing."

Finally, there comes the question of whether even within the industrial field we want to prohibit monopoly as well as aggressive monopolizing. Probably a monopoly achieved merely by the superior efficacy of a formerly competitive business unit (if such

¹ This could be done by omitting the word "or commerce" from the first three sections of the act. Or if this should be thought to raise a doubt as to the statute's constitutionality, the words "in restraint of trade or commerce" might be changed to read "in restraint of competition in commerce."

² This, of course, has nothing to do with the questions relating to the way in which the New Haven officers and directors discharged their trusteeship for the stockholders of that road.

a thing were possible) would not be condemned by the courts as a violation of the Sherman act. Monopolies achieved by the active suppression of competition are so condemned. What, then, is the status of a monopoly built up merely by the peaceful union or absorption of competitive units? Such combinations in the railroad field have already been condemned in the Northern Securities and Union Pacific cases. Should similar combinations in the industrial field likewise be broken up, or (since unfair methods are ruled out) should we put our trust in latent competition? This seems to have been in essentials the problem that was put before the District Court in the International Harvester Company case,¹ in which the decision was that the combination was condemned by the statute.² The decision of the Supreme Court in this case will do much to fix the boundaries of the region to which the act applies. On which side public policy properly lies is hard to determine. On grounds of economic principle there is nothing to fear from such combinations. But on the other hand there is not much to gain from them, and in practice it would prove hard to draw a line between peaceful combination and predatory combination for monopoly's sake. Probably little harm would be done, and possibly some good, if no such line were drawn except to mark off one combination as illegal even in the early stages of the monopolizing process, and the other as legal except when combination has reached the full measure of monopoly.

3. Does the Sherman act provide an efficient mechanism for achieving its own ends? That its criminal features have been relatively ineffective is generally admitted. In many cases these criminal remedies could not have been enforced except at the expense of the efficiency of the proceedings for the dissolution of the combination. Furthermore, it has been found in practice that it is a very difficult thing to secure a criminal conviction from a jury for an offense so genefal, so abstract, so little tainted with a general and customary imputation of immorality as "restraint of trade" or "monopolizing." It is often said that "restraint of trade" is no more indefinite than "fraud." This is very likely so, but there

¹ 214 Fed. 987.

² This decision is criticized by Clarence E. Eldridge, "A New Interpretation of the Sherman Act," *Michigan Law Review*, November, December, 1914

is the essential difference that fraud consists in, or is accompanied by, simple and concrete actions, while restraint of trade is, as I have suggested, general and abstract. It is significant that the few convictions obtained under the Sherman act have been in cases where the restraint of trade or of commerce consisted in, or was evidenced by, specific and objectionable acts. There is no reason to expect that it will ever be easy to secure convictions for restraint of trade or monopolizing in cases where the separate steps taken in the creation of the restraint are unobjectionable except as part of the general scheme. As it is, the statute provides merely an indirect and uncertain way of penalizing unfair competitive methods.¹ I see no reason why the criminal remedies of the Sherman act should be retained.

The proceedings in equity for the dissolution of a combination have, on the contrary, proved to be increasingly effective, in the sense that they have resulted in an increasing number of successful prosecutions. It is contended by many that the enforced dissolution of a combination means generally a mere change in form without diminution in monopoly power; that we are merely hunting the quarry from tree to tree. But in neither transportation nor industry does it clearly appear that the newer and more unified forms of consolidation would not have largely displaced the old, even if the movement had not been hastened by legislation and by decisions under the common law. Among other things tending to this end the various strategic advantages of the consolidated unit, the permanency and dependability of the newer forms of combinations, making possible the adoption of business policies based on long-time considerations, and the opportunities the single corporation, whether holding company or not, affords for the capitalization of promoters' profits may be mentioned.

But even if the Sherman act has itself been partly responsible for the change in the form of combinations (it cannot have increased their number), it does not follow that in the future its history is to repeat itself in this particular. It may be that, after a long chase, the quarry has finally been driven into a corner.

Granting all this, is it proved that the mere dissolution of industrial combinations accomplishes anything, especially in cases where

¹ Neglecting its anomalous application to strikes and boycotts.

the equities in the combination are made the basis of a pro rata distribution of the equities in its constituent parts? I cannot attempt here to answer so large a question. But I may suggest a few general conclusions: (1) The results must vary with the nature of the business and the degree to which the aggressive suppression of competition played a part in maintaining monopoly conditions. The results must also vary with the degree to which railway rates and other distributive conditions had been shaped for the benefit of the combination. (2) Dissolution rarely comes early enough—not until the monopolistic situation (if any exists) has become more or less crystallized. This suggests the need of emphasis upon methods rather than achieved results, upon monopolizing rather than upon monopoly. (3) The operation of the statute is intermittent. Dissolution should be carefully followed up, and every step in the process of restoring normal conditions should be carefully watched. This requires administrative machinery. (4) The Sherman act needs supplementing. At certain points, at least, this is accomplished in the new anti-trust legislation which will be considered in a subsequent paper.

But in its own field the Sherman act has a value all its own. No matter how carefully drawn the rules of the game may be, no matter how high the level set by the law for competition, new business situations, new conditions are bound to arise, not covered by specific statutes, and yet contrary to the generally accepted public policy of the maintenance of competition within its own proper field. The Sherman law, as a general declaration of public policy, has an elasticity and adaptability to new situations of all kinds not possible to legislation of a more specific sort. Its declaration of public policy is general enough so that it may gradually grow in meaning and change in application through judicial decision as the common law has grown and changed. So long as the preservation of competition in that large part of the industrial field in which it is feasible is public policy, why should we not, through such a statute, continue to give to the federal courts jurisdiction in cases involving the assertion of that public policy? But, it needs amendment in the ways which have been indicated.

ALLYN A. YOUNG

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THE SHERMAN ACT AND THE NEW ANTI-TRUST LEGISLATION. II

The new anti-trust legislation comprises two statutes, the Federal Trade Commission act, signed by the President on September 26, 1914, and the so-called Clayton act, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," signed on October 16, 1914. To some extent the two statutes overlap, in other respects they are supplementary, and the Clayton act also bears upon a variety of more or less unrelated matters which are not touched by the Trade Commission act. Neither statute is so good a specimen of draftsmanship as is the Sherman act, while the Clayton act, with its twenty-six sections and its heterogeneous subject-matter, is a particularly formless and unorganized piece of legislation. In statute-making, defects of form are prone to be associated with defects of substance, and there is reason to fear that there is such an association in the new anti-trust legislation, and more especially in the Clayton act. Graver defects than those of form might, in fact, be expected to be found in any legislation originated, formulated, and shaped as were these measures.

To approach the matter in another way, I must confess my own feeling of doubt as to just what general sort of change in the business situation the new legislation is intended to accomplish. It is clear, of course, that these statutes reflect the general public

policy that is declared in the Sherman act; that is, that competitive business conditions must be maintained and safeguarded. It is also clear that the new statutes are more detailed and specific in some of their condemnations than is the Sherman act. Moreover, additional administrative machinery is provided for the enforcement of the announced public policy. But despite all this it is not clear that the new legislation is based on any clear-cut and definite convictions as to the shortcomings of the Sherman act or as to the general principles on which supplementary legislation should be based. This does not in itself condemn the new legislation, for the question of the wisdom and effectiveness of its separate parts yet remains open. No one general purpose, but a variety of different purposes, characterizes the new laws. This is again a matter of origins and of legislative history.

The platform adopted at the Baltimore convention of the Democratic party in 1912 declared for "a vigorous enforcement of the criminal as well as the civil law against trusts and trust officials," and demanded the enactment of "such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States." It added:

We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions.

Regret was expressed that the Sherman act has received "a judicial construction depriving it of much of its efficacy," and legislation was favored restoring to that statute "the strength of which it has been deprived by such interpretation."

In the presidential campaign which followed much emphasis was put upon the Democratic party's attitude of hostility to monopoly; partly, no doubt, by way of contrast to the program of regulation announced by the Progressive party. But there was little talk of particular measures; it was such things as "the emancipation of business" as one part of the "new freedom" which figured most largely in the campaign.¹ After Mr. Wilson's election

¹ Cf. Woodrow Wilson, *The New Freedom*, chaps. viii, xi.

and inauguration no information was given out with respect to the anti-trust law program of the administration until the revision of the tariff and of the banking law had been achieved. Early in January, 1914, it was announced that Chairman Clayton of the House Committee on the Judiciary had drafted tentative bills covering the more important features of the President's anti-trust proposals.¹ On January 14, after a conference between President Wilson and the chairmen and some of the other Democratic members of the House Committee on the Judiciary and of the Senate Committee on Interstate and Foreign Commerce, a preliminary statement of the legislative program was given out. On January 20, following another conference with the same committeemen, the President addressed Congress on the subject of the proposed legislation, explaining its general outlines and warmly advocating its enactment. Such legislation should include, the President said, (1) the prohibition of interlocking directorates in banking, railroad, industrial, and public-service corporations, (2) provisions for regulation of railroad-security issues by the Interstate Commerce Commission, (3) the creation of an interstate trade commission, (4) the penalizing of officers and directors or other individuals responsible for the illegal activities of corporations, and (5) giving to private litigants the right to sue upon the basis of the findings in government suits, and permitting the statute of limitations to run against such individuals only from the date of the conclusion of the government action. The message further suggested, without positive recommendation, that limitations might be put upon the voting power of individuals or groups of individuals holding the controlling interests in supposedly competing companies.

¹ For that important part of the legislative history of the new statutes which lies outside the formal proceedings recorded in the *Congressional Record* I have had to rely very largely upon the Washington dispatches and correspondence in the daily papers. In particular I have examined the files of the *New York Evening Post*, the *New York Times*, and the *New York Journal of Commerce*. I have tried to refer to definite dates frequently enough to make it easy for anyone to check up my statements. It cannot be hoped that an account based on newspaper sources is entirely free from error, but I imagine that its general outlines are fairly accurate. So far as possible, of course, I have drawn my information from the *Congressional Record*, the various committee hearings, and prints of the bills in their successive stages.

These recommendations were partly in line with the statements of the Baltimore platform. They did not, like the platform, condemn mere size "as a menace to competitive conditions," nor did they contemplate restoring to the Sherman act an effectiveness of which, in fact, the decisions of the courts had never deprived it.¹ But in the third and fifth particulars mentioned above, the President's recommendations went farther than the party platform. The principal departure was in the advocacy of the establishment of an interstate trade commission, for the Democratic party had never declared itself in favor of a commission, although the creation of a commission was supported in both the Republican and the Progressive national platforms of 1912.

After the President's address had been delivered it was announced that his proposals would be embodied in five different bills, as follows: (1) the Interstate Trade Commission bill; (2) the Interlocking Directorates bill; (3) the Definitions bill, intended "to give further and more explicit legislative definition to the policy and meaning of the existing anti-trust law"; (4) the Trade Relations bill, dealing primarily with unfair competition and with matters of procedure in individual suits under the Sherman act; and (5) a Railway Securities bill.

The first four bills, it was announced, had been drafted by Representative Clayton of Alabama, chairman of the House Committee on the Judiciary, in consultation with Representatives Carlin of Virginia and Floyd of Arkansas, ranking Democratic members of the committee. The preparation of the Railway Securities bill was intrusted to the House Committee on Interstate and Foreign Commerce, whose chairman, Representative Adamson of Georgia, had already introduced a bill dealing with the same subject. It had been expected by the members of the House Committee on the Judiciary that their committee would consider, amend, and report upon the other four measures, but a vote of the

¹ This mistaken interpretation of the significance of the decisions of the Supreme Court in the Oil and Tobacco cases is expressed in many bills that have been introduced into Congress since those decisions. Most important of these, perhaps, were the bills introduced by Senator LaFollette in the 61st and 62d Congresses. In the recent session of the 63d Congress Representative Stanley of Kentucky was particularly active in the support of legislation designed to repair the damage supposed to have been done in these decisions. See his testimony before the House Committee on the Judiciary, Hearings, p. 65.

House, taken at the conclusion of the President's address, gave the Committee on Interstate Commerce jurisdiction over the Interstate Trade Commission bill as well as the Railway Securities bill.¹

The four bills prepared by the House Committee on the Judiciary² were made public, in tentative form, on January 22. The Definitions bill and the Trade Relations bill contained many of the features and much of the phraseology of two of the "Seven Sisters" bills, enacted in New Jersey when Mr. Wilson, then President-elect, was governor of that state.³ The Interlocking Directorates bill, applying as it did to banks and industrial corporations as well as to railroads and to corporations contracting with them, showed distinctly the influence of the Pujo committee's investigation of the money trust in 1912 and possibly of the disclosures of abuses of trust on the part of the officers and directors of several railroads.⁴ The Interstate Trade Commission bill, drafted in consultation with Senator Newlands, chairman of the Senate Committee on Interstate Commerce, bore a close resemblance to the bill introduced by Senator Newlands in the Sixty-second Congress, as tentatively amended by his committee.⁵ But it contained some new features.⁶

¹ A similar conflict over jurisdiction occurred in the Senate. There it was the Committee on Interstate and Foreign Commerce which had been selected to give general supervision to the administration measures, but the chairman of the Senate Committee on the Judiciary early announced that since it was that committee which had been principally concerned with the framing of the Sherman act (as well as the Interstate Commerce act) he would insist that all bills amending or supplementing the Sherman act be reported to it, although the Trade Commission and Interlocking Directorate bills might be referred to the other committee. Very likely the reason that the legislative supervision of the administration's program was first intrusted to the House Committee on the Judiciary and the Senate Committee on Interstate Commerce is that both of these committees had been actively concerned with anti-trust measures in the preceding Congress.

² Principally, it is understood, by Representatives Clayton, Carlin, and Floyd.

³ Laws of New Jersey, 1913, chaps. 13, 15.

⁴ But the Democratic national platforms of both 1908 and 1912 contained declarations in favor of the prohibition of interlocking directorates.

⁵ Senate Report No. 7326, 62d Cong., 3d sess., p. 21.

⁶ Attempts to increase this list of bills by securing administrative indorsement of a measure providing for the public regulation of stock exchanges were unsuccessful. If the press accounts are to be trusted, President Wilson chose to base his refusal to indorse such a measure upon the ground that the matter with which it dealt was not mentioned in the Baltimore platform. But as much could have been said of the Trade Commission bill and of the major portions of the Definitions and Trade Relations bills.

Because this last-named bill had to be referred to another House committee it was introduced at once (January 22) in both the House and Senate and was by each body referred to its Committee on Interstate Commerce. It was for this reason, possibly, that criticism first centered on the trade commission proposals. Both in and out of Congress there was less objection to the establishment of a trade commission than to any other part of the proposed legislation. The only questions seriously raised related to the powers and functions which should be given such a commission. The bill as first introduced provided for an interstate trade commission of five members, which was to absorb the Bureau of Corporations, and of which the Commissioner of Corporations was to be the first chairman. It was to be empowered (1) to require regular and special reports from all corporations engaged in interstate commerce (except common carriers), upon such matters and in such form as it should prescribe; (2) to subpoena witnesses and require the production of books and papers of all sorts; (3) to institute inquiries upon its own initiative or upon complaint to ascertain whether any corporation subject to the act was so organized and was conducting its business in such a way as to violate the Sherman act or any supplementary statutes, and to inform the Attorney-General of any violations so discovered; (4) to make similar investigations at the request of the Attorney-General or of a corporation itself, and, in case a violation of the law was discovered, to prepare a finding prescribing the changes and readjustments necessary to effect compliance with the law, in order that the finding might be used by the Attorney-General in terminating the unlawful condition either by agreement with the corporation or by suit; (5) to report (at the request of the court) upon any aspect of the litigation or of the proposed decree in suits in equity under the Sherman act, and (6) to make an annual report containing information collected by it and recommendations for additional legislation.

The commission was to be very much like the Bureau of Corporations, but with added dignity and increased powers. Its primary function was to be that of aiding the Department of Justice and the courts in the enforcement of the Sherman act and any supplementary statutes. In current discussion much emphasis

was put upon the usefulness of such a commission in planning the reorganization of monopolistic combinations and especially in the preparation of voluntary agreements for reorganization or dissolution and of "consent decrees." It was evidently expected that the Department of Justice would continue to be as successful as it has been in the past few years in securing the consent of corporations and combinations to the entering of decrees against them.¹

The criticisms of the Trade Commission bill were of various sorts. Many critics thought that there was no necessity of subjecting small business enterprises engaged in interstate commerce to the control of the commission. Objections were also urged against the "inquisitorial powers" of the commission in respect to making all kinds of information about the conduct of business undertakings, including business secrets, matters of public record. It was not fair, it was said, to quote as a precedent the similar powers given to the Interstate Commerce Commission, for that commission dealt only with quasi-public corporations. On the other hand, the proposed statute did not go far enough to satisfy the radicals who wanted the commission empowered to regulate definitely the business operations of large combinations, or those less radical persons who wanted the commission empowered to grant clean bills of health to existing or proposed combinations or contracts in restraint of trade, which would carry with them immunity from prosecution under the Sherman act.

There was no agreement in favor of the bill in either the Senate or House Committee on Interstate Commerce, and it developed that Attorney-General McReynolds, who had not been consulted with respect to the original drafts of any of the proposed laws, felt that the powers of initiative proposed to be given to the commission might lead to some conflict with the Department of Justice in the enforcement of the anti-trust laws. On February 16, the House committee, which had been holding hearings on the bill since January 30, turned the bill over for redrafting to a special subcommittee of which Representative Covington of Maryland was

¹ This has been possibly the most significant recent development in the enforcement of the Sherman act. For a list of recent cases so settled see the *Annual Report of the Attorney-General*, 1914, p. 12. There is a good discussion of the matter in the testimony of Mr. F. H. Levy before the House Committee on the Judiciary, Hearings, p. 231.

made chairman. The revised measure (the "Covington bill") was not reported till March 16. It curtailed the powers of the proposed commission by providing (1) that annual reports should be required only from corporations with a capital of more than \$5,000,000, smaller corporations being required to furnish such information only if belonging "to any class of corporations which the commission may make," (2) that no information obtained by the commission might be made public without its authorization, and (3) that investigations to determine the existence of violations of the anti-trust laws were to be made only at the direction of the President, the Attorney-General, or either House of Congress. The number of commissioners was reduced to three, and it was no longer provided that the Commissioner of Corporations should become *ex officio* a member of the new commission. This measure would have made the commission even more distinctly an arm of the Department of Justice, and in some respects its powers would have been less than those of the Bureau of Corporations.

In the meanwhile the Senate Committee on Interstate Commerce had been considering the original Clayton-Newlands Trade Commission bill, but had shown a disinclination to report it out as a separate measure. Some of the members of the committee thought that while the inquisitorial features of the bill went too far, in other respects insufficient power was given to the commission. Senators Cummins and Clapp, radical Republicans, became dissatisfied with the way in which the majority members of the committee took things into their own hands, and for a while withdrew from the discussions of the bill. The principal objections raised in this committee were to the other tentative measures which were still under discussion in the House Committee on the Judiciary. Particularly it was felt that the Definitions and Trade Relations bills would not strengthen the Sherman act. So it was proposed to formulate an omnibus measure which should cover the subjects of the trade commission, interlocking directorates, capitalization, and holding companies.¹ This bill was to be reported to the Senate as a substitute for any bills which the House might pass.

¹ The preparation of this measure was intrusted to a subcommittee, of which Senators Newlands and Cummins were active members. The bill was reported by the subcommittee to the full committee on May 1.

On May 22 the House, sitting as a committee of the whole, approved the Covington bill and on June 5 it was passed.¹ But the other pending anti-trust measures were passed by the House on the same day, and when these came to the Senate only the Covington bill and a railway securities bill were referred to the Committee on Interstate Commerce, the other measures being referred to the Judiciary Committee. Thus deprived of its jurisdiction over many of the matters covered in its proposed omnibus bill, the Committee on Interstate Commerce decided to report only its first eight sections, dealing with the trade commission.

But yet another factor had to be taken into account. On April 13 Representative Stevens of New Hampshire had introduced a trade commission bill as a substitute for the Covington bill which had already been favorably reported by the House Committee on Interstate Commerce, of which he was a member. In most respects it was much like the Covington bill, but it added two important administrative functions to the powers of investigation for which the Covington bill provided. These additional powers were (1) to compel the use of a uniform system of accounts by corporations making annual reports to the commission, and (2) to issue orders restraining the use of unfair methods in competition. This bill failed to secure consideration by the House, and on May 22 that body defeated by a decisive vote a proposed amendment to the Covington bill, providing for a uniform accounting system. The Stevens bill, in fact, was not more seriously considered than any other of the scores of anti-trust bills embodying the views of individual members of Congress.

But on June 12 Mr. Stevens, in company with Senator Hollis of New Hampshire and Mr. Louis D. Brandeis, whose views were expressed in the Stevens bill, conferred with President Wilson.

¹ The vote was not recorded, but a motion to recommit was defeated by a vote of 151 to 19.

As indicating the general approval of the creation of a trade commission a referendum vote of the United States Chamber of Commerce is significant. The local commercial organizations constituting that body reported 522 votes in favor of the establishment of the commission and only 124 as opposed. It is especially significant that the only feature disapproved was the section (of the original Clayton-Newlands draft) empowering the commission to report upon the legality of particular contracts or combinations upon the application of the parties concerned.

The result was that the Stevens bill was commended to the serious attention of the Senate Committee on Interstate Commerce.¹ It does not appear, however, that there was any general expectation that the legislative program of either the President or the committee would be seriously altered. It was thought to be too late to introduce new and highly debatable proposals into the Trade Commission bill. Moreover, the committee had had before it for some time a bill introduced by Senator Clapp of Minnesota, himself a member of the committee, which contained provisions with respect to the control of unfair competition very similar to those of the Stevens bill. But it became understood that the President favored these new proposals, and on June 12 the committee agreed to adopt the sections of the Stevens bill relating to unfair competitive practices. On June 13 the completed draft, containing the trade commission section² of the committee's proposed omnibus bill, together with the new provisions taken from the Stevens bill and one additional section providing for an immediate investigation of practices in foreign trade, was reported to the Senate.

When, on June 25, the debate on the bill was opened in the Senate, it became apparent that the control of unfair competition was to be the principal bone of contention. It was urged by opponents of the bill, including Democrats as well as Republicans, that the power of court review was inadequate, and it was claimed that the phrase "unfair competition" was too vague and uncertain in meaning to afford a reasonable criterion either for the commission or for business enterprises. And if given a rigid definition by the commission, it was said, it might stand in the way of successful

¹ This marks a change in the attitude of the administration. On January 26 President Wilson had stated to a group of senators and representatives his views of the functions of a trade commission. It was, he said, to be "smelling around all the time for rats"; its information should be at the disposal of all branches of the government, but it should be charged with the duty of bringing violations of the law to the attention of the Department of Justice; its findings were to be binding, the Attorney-General retaining the power to determine whether there had been a violation of the law; the commission was to assist the courts in the formulation of decrees. This, it will be noted, was merely an analysis and a detailed approval of the provisions of the original Clayton-Newlands bill.

² The proposed commission now appeared as the "*Federal Trade Commission*"—a name which was substituted for "*Interstate Trade Commission*" in order to prevent confusion with the Interstate Commerce Commission.

prosecutions under the Sherman act, in cases where practices used in achieving monopoly had not been called "unfair" by the commission.

Although, in the light of subsequent developments, it seems likely that the bill would have passed the Senate at any time that it could have been brought to the vote, the sponsors of the bill either overestimated the strength of the opposition or were themselves somewhat apathetic as to the fate of the provisions which had been taken over from the Stevens bill. As it was, some of the opposition seems to have been prompted by the desire to postpone action on the anti-trust bills till another session of Congress. Many amendments of the section dealing with unfair competition were offered, and at least four of these were submitted by individual members of the Committee on Interstate Commerce. Amendments offered by Senators Pomerene of Ohio, Hollis of New Hampshire, and Saulsbury of Delaware, all tended distinctly to lessen the powers of the commission. Senator Pomerene's proposal went farther than the others in this direction, for it provided that the findings of the commission should be subject to court review, both as to facts and as to law, and that new evidence might be brought into court if it were shown that it could not reasonably have been introduced before the commission.

The majority members of the Committee on Interstate Commerce decided that nothing much stronger than the Pomerene amendment would be accepted by the Senate, so Senators Pomerene and Walsh were appointed to prepare a revision of the section in question. The result (made public on July 30) was a slight modification of the original Pomerene draft, the principal difference being that the revised draft made the findings of the commission *prima facie* evidence in court proceedings, instead of leaving them on a parity with new evidence. It was reported, moreover, that the Democratic members of the Committee on Interstate Commerce were willing to cut the unfair-competition section out of the bill, in order not to block the progress of the anti-trust legislation. But, to their surprise, the Senate, on August 1, adopted Senator Cummins' relatively drastic substitute.¹ This

¹ The vote was 33 to 25. The division was not along party lines.

gave to the commission's findings substantially the same standing in court that now obtains in the case of the findings of the Interstate Commerce Commission.

The chief stumbling-block out of the way, further progress was easy. The bill had already received some minor amendments and a few more were added. On August 5 the bill passed the Senate by the vote of 53 to 16.¹

The House refused to accept the Senate bill and a conference committee was appointed. The committee found difficulty in coming to an agreement, but there was less difference about the general power over unfair competition which the Senate bill gave the committee than over the matter of the judicial review of the exercise of that power. Finally it was arranged that the findings of the commission should be final as to matters of fact, the court review being limited to points of law. The commission cases were to go directly to the circuit courts of appeals instead of to the district courts. This was for the purpose of saving time and of preventing conflicting decisions. Appeals to the Supreme Court could be made only on writ of certiorari. The conference committee changed the offense against which the commission is to proceed from "unfair competition" to "unfair methods of competition." It also introduced a new provision, which permits the commission to refuse to investigate alleged instances of unfair competitive methods if it appears that no public good would follow from such proceeding. This saves the commission from having to follow up a host of complaints of petty offenses and allows it to refuse to be used as a means of annoying a complainant's competitors. With respect to the commission's general powers of investigation the conference committee adopted what were substantially the provisions of the House bill. The conference draft was accepted by the Senate on September 8 and by the House on September 10.²

In the meanwhile the progress of the other anti-trust measures had been even more halting. The tentative drafts of the Interlocking Directorates bill, the Definitions bill, and the Trade Relations bill remained in the hands of the House Committee on the

¹ Twelve Republicans voted for the bill and 14 against it.

² The vote was 43 to 5 in the Senate. There was no roll call in the House.

Judiciary, which began its hearings on these measures on January 29. In the hearings as well as in outside comment the Definitions and Trade Relations bills were severely criticized.

By the terms of the Trade Relations bill five sections were to be added to the Sherman act. The first section prohibited discriminations in price for the purpose of injuring or destroying a competitor of either the buyer or the seller, but permitted dealers "to select their own customers"¹ except for mine operators, who, like those engaged in public callings, were to be compelled to sell to all responsible persons who might apply. The second additional section prohibited factors' agreements. Another section made judgments for the government in suits under the act conclusive evidence in personal suits. Individuals were permitted to sue for injunctive relief against a threatened violation of the act, and it was specified that the first two additional sections should not be held to limit the meaning of the second section (condemning "monopolizing") of the original act.

The Definitions bill specified certain things that should be deemed to constitute "restraint of trade" or "monopolizing" under the Sherman act. These included agreements entered into with a purpose (1) to "carry out restrictions in trade" or acquire a monopoly, (2) to limit production or to increase prices, and (3) to prevent competition in making, selling, transporting, or purchasing any commodity. These specifications would have added nothing to the meaning of the Sherman act as interpreted by the courts. But a fourth clause was so sweeping in its condemnation that it must be quoted:

To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production or transportation, of any production, or transportation of any product, article, or commodity. ✓

It is hard to see how this clause could have been interpreted by the courts, even if the "light of reason" were utilized, except as preventing all agreements in restraint of trade, including those

¹ Thus permitting a manufacturer or jobber to refuse to sell to consumers and validating exclusive agency contracts.

reasonable and necessary agreements incident to the creation of a partnership or the sale of the good will of a business.

X The Definitions bill made officers and directors personally liable for the violation of the act on the part of a corporation, and provided that it should not be held to limit or curtail the meaning or effect of the Sherman act. It was planned to add a paragraph relating to holding companies to the bill before it was introduced in the House.

The objections brought against the Definitions bill were more forceful than those directed against the Trade Relations bill. Business men likely to be affected by it objected to its sweeping condemnations, and many careful students of the Sherman act feared that, despite the disclaimer in the bill, the effect of any specific definitions of offenses under the act would be to render its application less elastic, and to harden and ultimately to limit its meaning. It was also suggested that it would take years to reach a definite judicial interpretation of the meaning of the various "definitions" in the bill.

The Interlocking Directorates bill, in its original form, prohibited any officer or director of a corporation (or member of a firm) engaged in producing or selling coal, structural steel, or other railroad supplies, or in conducting a bank or trust company from serving as an officer, director, or employee of a railroad or other interstate corporation. It also made it illegal for anyone to serve as officer, director, or employee of two or more banks if one was a federal reserve bank or a member of a federal reserve bank, and thus under federal jurisdiction. The presence of common directors in two or more corporations engaged in interstate commerce was made conclusive evidence of a combination in restraint of commerce subject to the penalties of the Sherman act.

The objections brought against this bill referred to such matters as the difficulty of making the necessary changes and adjustments within the two years allowed, the scarcity of men properly qualified for important directorships, the desirability of securing harmonious business policies (especially in the case of railroads), the encouragement that would be given to the election of "dummy directors," the advantage that the presence of the names of well-

known financiers gives in obtaining credit abroad, and the legitimacy of the representation of important financial interests on the directorates of all corporations in which such interests have large investments. In general, most of the critics held that the bill condemned a mass of necessary and useful arrangements in order to reach a few admittedly objectionable cases.

But, as in all similar cases, the logic of the specific criticism brought against the bills was less important than the general feeling with respect to the desirability of any legislation of the sort. It was apparent from the beginning that the support accorded these measures in Congress would be less cordial than that given to the Trade Commission bill. By March 1 it was reported that there was much disagreement in the House Committee on the Judiciary, and that the alignment of the members varied on the different bills. None of the measures, it was further reported, could command a majority in the Senate Committee on Interstate Commerce. This committee, as I have already said, decided to disregard these original drafts and to attach to its Trade Commission bill some sections covering part of the same ground. The Attorney-General, moreover, let it be understood that he did not favor any attempts at legislative definition of the general phrases of the Sherman act.¹ Under these conditions the opponents of further anti-trust legislation began to hope that Congress might content itself with establishing a trade commission.

At this crisis the administration showed itself distinctly resourceful. Although the President had on several occasions conferred with Representatives Clayton, Carlin, and Floyd, who were the sponsors for the bills, it was now stated that the bills should not be considered as having received his approval, and that they were merely tentative drafts intended to cover some of the reforms urged in the President's special message. Moreover, the President saw that there was cogency in the arguments of those who wished to have the Sherman act left intact, and he announced that he feared that attempts at rigid definitions might weaken the act.² The

¹ Importance must also be attached to the similar attitude of Representative Underwood, the majority leader in the House.

² First announced, so far as I can find, after a conference with the Attorney-General on February 18.

division of the proposed legislation into several bills was seen to be a tactical error. These separate measures were better targets for criticism than a single bill would have been, and at the same time they afforded a poorer rallying-ground for those who were willing to support the administration.

During March, Representatives Clayton, Carlin, and Floyd held several conferences with the President, and it became understood that the bills were to be rewritten so as to modify the language of the Trade Relations bill and reduce the scope of the Definitions and Interlocking Directorates bills. Finally, after a conference at the White House on April 3, it was announced that the House Committee on the Judiciary would bring out an "omnibus anti-trust bill," embracing revisions of the three bills already mentioned together with the Holding Companies bill. This last had been made public on March 17, and was by no means a drastic measure.

But there was yet another difficulty to reckon with. This had to do with the status of labor unions under the Sherman act. The sundry civil service appropriation bill which was passed by Congress in February, 1913, contained a provision forbidding the Department of Justice to utilize any money appropriated for the enforcement of the Sherman act in the prosecution of combinations of farmers or working-men. For this reason President Taft vetoed the measure, denouncing the exemption as vicious class legislation. When the Democrats came into power the bill, with the exemption section, was again passed. President Wilson approved the measure, but submitted with his approval a memorandum condemning the principle of the special exemption of certain classes from prosecution under the Sherman act. His approval, he said, would not have been given if it had not been for the urgent need of the appropriations and for the fact that other funds could be drawn upon, if need be, for the prosecution of the exempted combinations.

As soon as the preparation of the new anti-trust measures was begun the representatives of the unions let it be known that they intended to demand that their organizations, together with those of the agriculturists, should be specifically exempted from the condemnations of the Sherman act and of any supplementary legislation. President Wilson, had he so desired, could have supported

this demand without inconsistency. Frankly to limit the application of a statute against combinations in restraint in trade is a more defensible thing than to achieve the same result by crippling the administration of the statute while it is still couched in terms which have been held by the courts to apply to the actions of working-men as well as of capitalists. But the President did not choose this course. A sop was first offered to the unions by including in the draft of the proposed omnibus revision of the anti-trust bills a number of sections limiting and guarding the use of injunctions in labor disputes and providing for jury trials in contempt proceedings.¹ This did not satisfy the labor interests. Their views were embodied in the Bartlett-Bacon bill, one section of which read as follows:

That it shall not be unlawful for persons employed or seeking employment to enter into any arrangements, agreements, or combinations with a view of lessening their hours of labor, or of increasing their wages, or of bettering their condition; nor shall any arrangements, agreements, or combinations be unlawful among persons engaged in horticulture or agriculture when made with the view of enhancing the price of agricultural or horticultural products.

But the President and the framers of the anti-trust bills were unwilling to grant a flat exemption. When the new Clayton omnibus bill was made public, on April 14, it contained the following:

That nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers', agricultural, or horticultural organizations; orders or associations operating under the lodge system,² instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such orders from carrying out the legitimate objects of such associations.

This section was perfectly harmless and well-nigh meaningless. It is reported that it was at first accepted as satisfactory by some of the labor leaders, but a vigorous and effective campaign to

¹ These provisions were taken over from the Clayton Injunction bill and the Clayton Contempt bill which had been favorably acted upon by the House at the previous session of Congress. They were interpreted as a fulfilment of pledges made in the Baltimore platform and would undoubtedly have been brought up for separate consideration if they had not been joined to the Anti-trust bill. As these sections have only an incidental bearing upon anti-trust legislation there will be no detailed consideration of them in this paper.

² When the bill was reported to the House by the committee the words "operating under the lodge system" had been stricken out.

secure more definite exemption soon developed. What was really wanted, there can be small doubt, was the legalizing of the secondary boycott. But it was then thought hopeless to expect Congress to grant this in any direct form, and hence the efforts of the labor leaders were bent toward securing a general clause which might be construed by the courts so as to secure the desired end. It was openly said that the labor vote would be used against members of Congress who would not support a strongly worded exemption section, and the administration was threatened with the defeat of the whole budget of anti-trust legislation.

At a conference between President Wilson and the ranking Democratic members of the House Committee on the Judiciary on May 16 it was agreed, if we may trust the reports, that the labor section as it stood went far enough. On May 19 Mr. Frank Morrison and Mr. Jackson M. Ralston, secretary and attorney, respectively, of the American Federation of Labor, together with Representative Lewis of Maryland, leader of the labor forces in the House, appeared before the House Committee on the Judiciary, but their demands were not granted. Finally, on May 24, fifteen labor members of the House conferred with the Democratic members of the Committee on the Judiciary, and two days later there was a similar conference at the White House. A compromise was agreed to, which consisted in amending the section in dispute by adding the words: "Nor shall such organizations, orders, or associations or the members thereof be construed or held to be illegal combinations in restraint of trade under the anti-trust laws." On June 1 this amendment was adopted by the House without a dissenting vote.¹

Other aspects of the Clayton omnibus bill remain to be considered. It was introduced in the House on April 14 and referred to the Committee on the Judiciary. With minor changes it was favorably reported to the House on May 6. It contained, as we

¹ As the vote was not recorded there was an amusing scramble to get into the *Record*. A number of short statements of approval were made. For an account of the earlier history of the attempts of organized labor to secure this kind of legislation see Philip G. Wright, "The Contest in Congress between Organized Labor and Organized Business," *Quarterly Journal of Economics*, XXIX (February, 1915), 235.

have seen, new sections relating to injunctions and contempt proceedings as well as the exemption clause. The Definitions bill had been discarded and formed no part of the new measure. The Trade Relations bill had been thoroughly remodeled in phraseology and changed in other particulars. The section prohibiting factors' agreements was made to include tying contracts. These offenses, as well as unfair price discriminations, were no longer merely defined as attempts to monopolize trade or commerce, but were made specific misdemeanors, with specific penalties attached. The provisions of the Interlocking Directorate bill were distinctly softened. The prohibition of interlocking directorates between common carriers and banks was limited to cases in which the bank underwrites or purchases the carrier's securities. Two or more banks might have directors in common if no one of the banks had liabilities of more than \$250,000.00 and if no two of the banks were located in a city with more than 100,000 inhabitants. Mutual savings banks not having a share capitalization were exempted, wherever located. Interlocking directorates in the cases of naturally competitive corporations, other than common carriers, engaged in interstate commerce were made definitely punishable instead of being held to constitute conclusive evidence of violation of the Sherman act. The sections prohibiting holding companies were to apply only to cases where the effect is to "eliminate or lessen competition" among the corporations. It will be seen that as compared with the original bills, the anti-trust sections of the new Clayton bill were distinctly moderate.

The bill was not brought to a vote until June 5, and although the House had shown itself to be distinctly apathetic with respect to the measure, it was passed by a vote of 275 to 54.¹ A few amendments were made by the House. The owners and operators of oil or gas wells, reduction works, refineries, and hydro-electric plants were, like mine-owners, forbidden to refuse to sell their products to responsible applicants. Another amendment provided that anti-trust suits might be brought in any district where a corporation "resides or is found or has an agent." More important than these

¹ The vote on this measure was not so distinctly bipartisan as that on the Covington bill. Only one Democrat voted against it.

was a new clause legalizing traffic associations and other organizations of railroad officials.¹

The Senate referred the bill to the Committee on the Judiciary. The committee proceeded at once to strike out the amendment legalizing railroad organizations and the entire clause compelling mine-owners and others to sell to all responsible persons. Then it eliminated a clause providing that no person other than the United States should have the right to sue common carriers for injunctive relief from damages resulting from a violation of the Sherman act. The House bill had provided penalties for the violation of the sections dealing with price discriminations, tying contracts, and interlocking directorates. The committee substituted declarations of the illegality of these things and put the enforcement of the section into the hands of the proposed trade commission and the Interstate Commerce Commission.²

The amended bill was reported to the Senate on July 22. There the sections forbidding price discriminations and tying contracts were stricken out on the ground that these offenses were to be covered by the general power of the trade commission over unfair methods of competition.³ On the last day of the debates in the Senate two further amendments were made. A new section was adopted making it unlawful for an interstate corporation to do business in any state in ways contrary to the laws of that state or of the state in which the corporation was chartered. And at the instance of Senator Cummins the declaration, "The labor of a human being is not a commodity or article of commerce," was added to the section legalizing labor combinations.⁴ The bill, thus amended, passed the Senate on September 2 by a vote of 46 to 16.

¹ This was intended as an offset to the labor combination exemption. If retained in the bill it would probably have been ineffective, for it did not legalize agreements to "maintain rates." It had, however, the approval of the Interstate Commerce Commission.

² Record should be made of a curious amendment proposed by Senator Shields of Tennessee, which amounted to the declaration that acts in violation of the anti-trust statutes are unlawful and are prohibited.

³ The section on tying contracts was later restored, then again stricken out, and finally put back in an amended form.

⁴ The injunction sections of the House bill contained provisions legalizing picketing. These were stricken out by the Senate Committee on the Judiciary, but the Senate adopted a substitute, offered by Senator Cummins, which legalized both picketing and boycotting.

The conference committee had a difficult task, for the Senate changes were considerable and their net effect was to make the bill much less drastic. It was finally agreed, however, to restore the section forbidding price discriminations, but with the penal clause eliminated. The section in the House bill had condemned price discriminations made with intent "to injure the business" of a competitor of either seller or buyer, while the conference report made them illegal only when the effect may be to "substantially lessen competition or to create a monopoly." There was much difficulty over the matters of tying contracts, and of interlocking directorates, but the conference committee was able to come to a final agreement on September 23.

When the conference report was returned to the Senate opposition developed which at times threatened to take on the character of a filibuster. The thing chiefly attacked was that elimination of penal provisions for which the Senate itself was responsible. Senators who had not previously been known as hostile to large business interests joined with the representatives of non-radical opinion in condemning the alleged emasculation of the bill. Senator Reed of Missouri, who had previously made a number of unsuccessful attempts to secure the adoption of a radical amendment providing for receivers' sales of the property of combinations condemned under the Sherman act, was the principal opponent of this "capitulation to the trusts." Some of the opposition was, of course, based on the conviction that the proposed statute was inadequate to its purpose. But much of it represented a last attempt to delay action on the bill long enough to force an adjournment of Congress. The debate in the Senate dragged on until October 5, when the conference report was accepted by a vote of 35 to 24 after Senator Reed's motion to return the bill to conference with instruction to insist upon the penal clauses had been defeated by a very similar vote.¹ The debate in the House was along similar lines, but was much less prolonged. Yet the House did not vote upon the conference report until October 8, when it was approved by a vote of 244 to 54.

¹ Six Democrats voted for the motion to recommit, but only three voted against accepting the conference draft.

The Clayton act was thus the outcome of about eight months of deliberation. But in less degree even than is true of most important federal statutes, and in a markedly less degree than is true of the establishment of a trade commission, did it represent a real focus of the opinion of a majority of the members of Congress. Despite the large majority recorded in its favor the general attitude of Congress was that of unwillingly doing a set task. For many members of Congress the casting of a favorable vote was a matter of political exigency. Administrative pressure, party discipline, the political power of organized labor, and the undoubted fact that a majority of the voters at home would interpret a Congressman's vote against an "anti-trust" statute as a vote for monopoly were the dominant factors in the situation. And so many things were lumped together in the bill that it was impossible to segregate the good from the bad. The enactment of additional anti-trust legislation was in itself a praiseworthy carrying out of a party pledge. The particular shape which that legislation took is a matter in which the general views of the President, the pressure of interests strong enough, politically, to command a hearing, and the ideas of the few men actively interested, in Congress and out of it, who had definitely crystallized opinions as to what anti-trust legislation should be, each played a part.

ALLYN A. YOUNG

CORNELL UNIVERSITY

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THE SHERMAN ACT AND THE NEW ANTI-TRUST LEGISLATION. III

In this concluding paper I shall try to weigh the importance of the new legislation and to suggest some of its possible consequences. The topics which I shall consider are (1) the exemption of labor combinations, (2) the limitations put upon the use of holding companies, (3) the prohibition of interlocking directorates, (4) the condemnation of certain trade practices, (5) the power of the Federal Trade Commission over unfair methods of competition, and (6) the general powers and functions of the Commission.

The sixth section of the Clayton act, exempting labor combinations from the condemnation of the anti-trust laws, is as follows:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

The interpretation of this section may seem to be somewhat complicated by the inclusion of "agricultural or horticultural organizations." This is to be attributed, of course, to the desire of the labor leaders to secure for this section the support of

the senators and representatives from agricultural states. Agricultural organizations themselves were not actively engaged in lobbying for the enactment of these provisions. Most agricultural co-operative associations are conducted for profit and so are not specifically exempted by this section. Few, if any, of these, however, fall under the condemnation of the anti-trust laws. Agreements to maintain prices or to restrict output are not common among agriculturists. Attempts to come to such agreements, such as have been made by cotton- and tobacco-growers, have always been ineffective. I do not think that the exemption of agricultural organizations has any real importance, and there is no reason to suppose that it was intended to have importance.

The labor leaders who were active in the campaign for exemption professed to be satisfied with the section as it stands. But the opposition to it would undoubtedly have been firmer than it was if there had not been a belief on the part of many that it effected no substantial change in the existing status of labor organizations under the Sherman act. When the essential features of the present section were first decided upon, President Wilson stated in an interview that it did not exempt labor organizations from the operation of the Sherman law. Similar statements were frequently made in the congressional debates and as frequently challenged. For a final settlement of the question we must wait, of course, for court decisions, but some points seem even now to stand out rather clearly.

The declaration, "The labor of a human being is not a commodity or article of commerce,"¹ is little more than an empty *blague*, and the permission given to individual members of labor organizations to "lawfully carry out the legitimate objects thereof" is at once harmless and unavailing. If there is any effectiveness in the section it is in the clause, "nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

¹ The suits brought against labor unions under the Sherman act have not charged them with monopolizing "labor." It is an amusing circumstance that the first appeal to the protection of this clause should have been made by an employers' combination—the so-called "baseball trust."

Now no action has ever been brought for the dissolution of a labor union under the Sherman act. But Mr. Gompers, testifying before the House Committee on the Judiciary, said that labor combinations exist only by the tolerance of the Attorney-General. If Mr. Gompers' interpretation of the Sherman act is correct, if that statute condemns unions merely because they are combinations for collective bargaining, then it must be admitted that their specific exemption in this section is a matter of some importance. But there are reasons for thinking Mr. Gompers mistaken.]

[] In the first place, there is enough difference between the sort of "monopoly" which a labor union seeks to establish and such monopolistic industrial combinations as are clearly condemned by the Sherman act to make it uncertain whether the courts would put them in the same category. One is in principle an inclusive, the other an exclusive, monopoly. It is true that railroad mergers, such as were condemned in the Northern Securities and Union Pacific cases, are in some respects "inclusive" combinations. But the St. Louis Terminal Railroad case is a more instructive precedent.¹ The railroad in question has a virtual monopoly of terminal facilities in St. Louis. A suit for dissolution was brought against it under the Sherman act. The Supreme Court did not grant a dissolution order, but merely directed the company so to reconstruct its organization as to provide that new companies might participate in its ownership and be given the advantages of its services on equal terms with the railroads then in control of it. The parallel is not perfect, for the Terminal Railroad of St. Louis is a natural monopoly. But the case suggests that if similar suits had been brought against labor combinations the outcome might have been that the court would merely have insisted that admission to union membership must be granted to all applicants on fair terms.]

[] In the second place, it is doubtful even whether the courts would have deemed themselves authorized by the Sherman act to interfere in any degree either with the conditions of admission to union membership or with the ordinary trade agreements which unions attempt to enforce. For agreements among working-men to fix wages or hours or conditions of employment have only an

¹ 224 U.S. 383.

indirect and incidental effect upon interstate trade or commerce, while the courts have consistently held that the Sherman act covers only agreements which have a direct and primary effect upon such trade or commerce.

In the third place, there is a yet more important consideration which I have pointed out in the first paper of this series.¹ The Sherman act has been brought to bear upon working-men, not because labor unions are in themselves labor monopolies, and as such are in restraint of competition, but merely because strikes and boycotts have the effect of interfering in some degree with the free flow of goods from one state to another. This is, of course, what the labor interests wanted changed. It is not clear, however, that this section alters the law in this respect. I cannot imagine that the courts will hold that the provision that neither labor organizations nor their members shall be "held or construed to be combinations or conspiracies in restraint of trade" covers cases of this kind. If it does, a doubt as to the constitutionality of the section at once arises. It is true that the Supreme Court has recently held that a Missouri anti-trust statute is not in violation of the federal Constitution, despite the fact that the statute specifically exempts labor combinations.² But with respect to the matter in hand the question would be whether an exemption of such interference with the "free flow of commerce" as comes from the activities of labor combinations would not amount to a denial of "due process of law" to the members of such other combinations as are condemned for similarly interfering with commerce.³ It is not a question of the legality of the restraint of competition among working-men. The question is whether labor combinations may restrain *interstate commerce in goods* while such restraint is not permitted to other combinations. It may be that the whole line of cases in which restraint of the free movement of goods from one state to another has been condemned is based upon a twisted interpretation of the meaning of the Sherman act. But until that statute is so amended as to apply merely to restraint of competition as distinguished from

¹ *Journal of Political Economy*, XXIII (March, 1915), 210-13.

² *International Harvester Co. v. Missouri*, 234 U.S. 199.

³ Cf. L. P. McGehee, *Due Process of Law*, pp. 60-64.

interference with commerce there seems little chance that the exemption section of the Clayton act can alter in any important degree the present position of labor unions under the Sherman act.

There is, however, another provision in the Clayton act which may give labor combinations virtual immunity from the operations of the Sherman act. This section (the twentieth) prohibits the granting of injunctions by federal courts in labor disputes "unless necessary to prevent irreparable injury to property or to a property right," and specifies that such injunctions shall not prohibit striking, picketing, or boycotting. This in itself does not prohibit civil suits for damages or criminal prosecutions under the Sherman act. Probably it does not prohibit the granting of injunctions on the petition of the government, for the general provisions of the section apply only to cases "between employers and employees." But, so far as the delimitation of the scope of the Sherman act is concerned, such considerations as these become unimportant in view of the fact that the section concludes with the sweeping statement, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." This is the real exemption section. Its constitutionality is a matter about which there is some doubt, but its unconstitutionality is by no means assured. If the courts sustain it, labor unions will have been effectively freed from the restraints of the Sherman act.¹

The wisdom of the general policy of definitely legalizing strikes and boycotts is a matter which falls outside the province of the present discussion. That as one aspect of this legalization strikes and boycotts can no longer be reached by the Sherman act is, so far as it goes, a fortunate result. But, as I have already tried to show, it would have been better to give consistency and unity of meaning to the Sherman act by making it definitely a statute against monopolizing. "Interference with the movement of commerce," whether on the part of labor unions or others, is a thing apart from the controlling purpose of the statute. It is a pity that this desirable restriction in the scope of the statute should have been brought

¹ It will still be possible for the courts to restrain interference with interstate commerce by invoking general federal powers, as was done in the Debs case (158 U.S. 564). But this is not likely to be done except where the interference with commerce is of such a character or magnitude as to be a matter of general public concern.

about only indirectly and partially, and by means of the legalization of certain specific things which had been held to interfere with the movement of commerce. If "restraint of commerce," as a thing distinct from "restraint of trade" or "monopolizing," had been stricken out of the list of offenses condemned by the Sherman act, all of the restriction in the scope of the act which labor interests could have desired would have been accomplished without the appearance of unfair discrimination in their favor, without the suspicion of unconstitutionality, and, it may be added, without preventing the courts from restraining any direct physical interference with the actual movement of commerce.

The Clayton act prohibits the acquisition by one corporation of any part of the capital stock of another corporation where the effect may be "to substantially lessen competition" between such corporations, to "restrain commerce," or "to tend to create a monopoly." This provision is useless, although in individual cases it may prove to be mischievous. Ever since the Northern Securities decision, in 1904, it has been clear that the organization of holding companies for the purpose of eliminating competition or the acquisition by one corporation of stock in other corporations with the same end in view is illegal under the Sherman act. The new statute adds nothing to the existing law except that it prohibits such acquisitions of stock in every case in which the effect may be to lessen competition between the corporations directly concerned, even though general competitive conditions may continue to exist in the industry in which such corporations are engaged. Since the new law does not represent an attempt to get rid of the holding company as a general form of business organization, the absolute condemnation of the use of this device to effect the union of two or more competing enterprises is illogical. This is a new and, as it seems to me, unwarranted departure from the general principles of the common law in regard to "reasonable restraints of trade." Very likely little use will be made of this provision. But there is a chance that it may interfere with business arrangements which would be in no respect at variance with the general spirit and purpose of the anti-trust legislation.

Aside from the suppression of competition there are a host of evils connected with intercorporate stockholding which are not touched by the new law. The unfair treatment of minority stockholders, the general confusion in the adjustment of stockholders' and bondholders' equities, the opportunities for various fraudulent practices, and the artificial concentration of financial power, are some of these evils. Frequently these things are found at their worst in the relations between railroad companies and their subsidiaries, and here the Clayton act specifically permits intercorporate stockholdings. But such matters are outside the proper field of "anti-trust" legislation. Holding companies will be necessary so long as states refuse to give certain necessary rights, such as that of holding real property or of constructing a railroad, to corporations not of their own making. Their adequate regulation must wait upon the enactment of a federal incorporation law.

The provisions relating to interlocking directorates reach a larger variety of offenses than those relating to holding companies. In fact, at this point the Clayton act must be regarded as supplementary to the Federal Reserve and Interstate Commerce acts as well as to the Sherman act.

The provisions relating to banks apply only to banks and trust companies "operating under the laws of the United States," or, in other words, to federal reserve banks and their member banks. No such bank or trust company can have a director who is a private banker or a director of a state bank or trust company with aggregate liabilities, in the form of capital, surplus, undivided profits, and deposits, amounting to more than \$5,000,000. Nor can any bank in the federal system with aggregate liabilities of the kind specified of more than \$5,000,000 have officers, directors, or employees who hold similar positions in any other bank in the federal system. Finally, banks in the federal system, large or small, located in cities of more than 200,000 population may not have directors, officers, or employees who are private bankers in the same city or who hold positions in other local banks.¹

¹ Exceptions are made in the following cases: (1) Mutual savings banks having no capital stock are not affected. (2) There may be interlocking directors or officials in the case of two (but not more) banks if all the stock of one is owned by stockholders of the other. (3) Class A directors of federal reserve banks (elected banker directors) may be officers or directors of member banks.

[These new provisions were not enacted, it is safe to say, because of any real belief that there is a tendency to monopoly in the supply of ordinary commercial loans and discounts. The thing attacked was undoubtedly the alleged concentration of control over such banking resources as are utilized in aiding the larger financial operations of great corporations. That such control exists is not to be doubted, and it cannot be held that it has always been wisely used. But interlocking directorates among banks have in general little to do with this situation, and where they are related to it they are at most a symptom, a convenient mode of effecting co-operation, rather than a basic factor. A general governmental supervision of bankers' syndicates would be more effective than this prohibition of interlocking directorates.]

[A very common arrangement which will be affected by the new restrictions is the interlocking of the directors of two or more banks in the same city which afford different sorts of banking facilities and are hence complementary rather than competitive. Such alliances between national banks and trust companies are common. The directors who are on the boards of both banks are usually professional bankers or men who have substantial blocks of stock in each bank. There is much to be said for such alliances, and it is hard to see what is to be gained by putting difficulties in their way.] But to discuss the probable effect of these provisions upon the general banking situation in any adequate fashion would lead us far afield.

Another provision affects common carriers and corporations or firms having dealings with them in securities or supplies or contracting with them for construction or maintenance. If any director of the carrier, or its president, manager, or agent in the transaction, is a director, manager, or agent of the other concern or has a "substantial interest in it," such dealings may not amount to more than \$50,000 in any one year except as the result of competitive bidding under the supervision of the Interstate Commerce Commission. It is strange that so important a provision as this should be limited in its application to cases where officers or directors of the carrier are directly interested in the other corporation or firm. There is no obvious reason why all large transactions of the kind on the part of common carriers should not be subject to competitive

bidding. In its present form the provision leaves the door open for various methods of evasion, although its general effect probably will be wholesome.

[The most important change it may be expected to bring about is in the marketing of railroad securities. The presence of influential bankers on the directorates of American railroads has undoubtedly often helped the railroads to place their securities and to secure credit on advantageous terms. But on the other hand the banker-directors have often been able to secure substantial shares of the gains arising from various maneuvers in the field of railroad capitalization, and it is possible that, as a class, they have been more than adequately paid for their services. At any rate, it is highly undesirable that railroads should be managed with an eye to the security market rather than to traffic and earnings. In this particular, at least, the net effect of the new regulation should be good. So also should be the effect of the provision which makes the abuse of trust on the part of officers or directors of common carriers a felony under the jurisdiction of the federal courts.]

[All of the foregoing provisions relating to interlocking directorates primarily affect banks or common carriers. But it is further provided that no person may be a director of two or more industrial corporations engaged in interstate commerce if one of them has aggregate proprietorship liabilities¹ amounting to more than \$1,000,000 and if they are, "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws." This is another carelessly worded provision. Except for the provision of the Clayton act itself, which, by similarly careless wording, prohibits one corporation from acquiring the stock of any competing corporation, there is nothing in the anti-trust laws which forbids the elimination of competition between two or more competitors unless either a monopoly results or the agreement is part of a general scheme to create a monopoly. And so far as this new section applies to situations

¹ The statute reads, "capital, surplus, and undivided profits"—a form borrowed from the ordinary bank statement, but inaccurate and confusing when applied to industrial corporations.

where interlocking directorates might, in fact, be a means of effectively suppressing competition, it adds nothing to the Sherman act. Combinations effected with a view to monopoly, whatever the mechanism used as the means of combination, are unquestionably illegal under present interpretations of the Sherman act. If narrowly interpreted the new provision may prevent a large stockholder in two shoe factories, for example, from being a director of more than one of them. Aside from its possible interference with harmless arrangements of this sort, it seems to be useless.¹

The partial prohibition of interlocking directorates, like the similar prohibition of intercorporate stockholdings, is patchwork legislation. Among the various methods by which harmonious adjustments in corporation policies, for good or for evil, have been secured, these two (often found together) have in recent years become conspicuous. But so far as the suppression of competition is the thing at which the new legislation is aimed, it seems illogical to single out these devices for condemnation and leave such things as intercorporate leases and intercorporate sales of property in fee untouched. And, as we have seen, the use of these and other devices for the purpose of monopolizing is already prohibited by the Sherman act. Some confusion between the relation of these devices to admitted evils in corporation finance and their bearing upon the trust situation may have been a factor in determining the attitude of Congress. American corporation law needs thoroughgoing

¹ The provisions for the enforcement of the foregoing sections of the Clayton act are as follows: Violations of the section requiring competitive bidding under specified conditions are punishable by a fine of not over \$25,000 imposed upon the offending carrier, while in addition responsible officials and directors are punishable by a fine of not more than \$5,000, or by a year's maximum imprisonment, or both. Prosecutions are by the Attorney-General upon the information of the Interstate Commerce Commission. The enforcement of the other provisions relating to interlocking directorates as well as those relating to holding companies is by means of orders of the Interstate Commerce Commission, the Federal Reserve Board, or the Federal Trade Commission, according as the offending corporation is a common carrier, a bank, or an industrial or trading corporation. Orders are issued only after hearings. To secure compliance with its orders the Commission or Board is to apply to the circuit court of appeals, to which appeals may also be taken by the party against whom the order of the Commission is directed. In either case the findings of the Commission, "if supported by evidence," are final as to the facts. Appeal to the Supreme Court can be taken only upon certiorari.

revision, and the general status of the holding company and the qualifications of directors are among the things most in need of mending. But into this field of the internal relations of the corporation the new legislation does not go. And, so far as the provisions we have been discussing are concerned, its contribution to the arsenal of weapons against the suppression of competition is small.

[The trade practices condemned by the Clayton act are (1) discrimination in the prices charged to different purchasers, and (2) tying contracts and factors' agreements. The prohibition of price discrimination leaves room for reducing prices on account of the quantity sold or a lower "cost of selling or transportation," and for "discrimination in price in the same or different communities made in good faith to meet competition." This last exception promises to create difficulties. The prohibition of price discriminations is undoubtedly aimed particularly at the practice of local price-cutting on the part of large combinations for the purpose of crushing local competition. It will be hard to draw the line between price-cutting to "meet competition" and price-cutting to suppress competition. And yet the exception is necessary. Without it those manufacturers and jobbers who can get their products to a given market with minimum transportation and selling costs would have an undue advantage in that market over their competitors.¹ The tendency would be to hamper competition rather than to foster it. The control of price discriminations in competitive trade is at once more difficult and more dangerous than in the field of the natural monopolies.]

The prohibition of tying contracts and factors' agreements covers leases and sales of goods (patented or unpatented) made with the understanding that the lessee or purchaser shall not use or deal in the goods of a competitor of the lessor or seller, as well as special discounts or rebates made upon such conditions. But both this

¹ This would in turn lead to attempts on the part of railroads to readjust their rates so as to remove the handicaps put upon their own shippers. Given a system of railroad rates based upon transportation costs, the rigid prohibition of all price discriminations would in the long run be economically advantageous. But with railroad rates based on "charging what the traffic will bear" the economy of such regulation would be small. And it would be disastrous to introduce it suddenly.

prohibition and that of price discriminations apply only to cases where the effect of the prohibited arrangement may be to "substantially lessen competition or tend to create a monopoly in any line of commerce." In fact, these sections prohibit nothing that is not already condemned by the Sherman act.¹ And although the new provisions are to be enforced through orders of the Federal Trade Commission, issued after hearings, the Commission has to apply to the courts for decrees making its orders effective.² The general question of what sorts of arrangements may be held to lessen competition or to tend to create monopoly will be determined by the courts. But with the establishment of working precedents it may be expected that the Commission's proceedings will be prompt, simpler, and possibly more efficacious in other respects than the judicial proceedings under the Sherman act. In some cases, moreover, it may be possible to put a stop to attempts to suppress competition before a sufficient degree of monopoly has been achieved to make it feasible to invoke the Sherman act. Nevertheless, I do not believe the net effect will be notably different from what it would have been if the Sherman act had remained the only statute reaching these practices.

There has been a substantial body of well-informed opinion to the effect that the prohibition of specific unfair practices, especially the local price-cut and the factors' agreement, would be an effective supplement to the Sherman act. But this body of opinion took shape before the Supreme Court had indicated, as it did first in the Standard Oil case, that it would consider the use of such devices as *prima facie* evidence of an intent to violate the law against monopolizing, and before it had begun to include injunctions against the continuance of such practices in its decrees. Much of this opinion, moreover, took the form of a belief that a statute making these unfair practices criminal would prove more efficacious than the criminal provisions of the Sherman act. But the Clayton act does not attach criminal penalties to the violation of its prohibition of

¹ Except possibly, tying contracts relating to the use of supplies or other auxiliaries in connection with a patented article.

² The procedure for enforcement is the same as in the case of the provisions relating to holding companies and interlocking directorates.

these practices. In short, it adds nothing to the substantive law on the matter. It merely provides a new procedure, and this may prove to have some advantages.

This brings us to a provision which may come to be of far-reaching importance. The Federal Trade Commission act empowers the Commission to issue orders restraining individuals, firms, and corporations (except banks and common carriers) from using "unfair methods of competition in commerce." These orders are to be issued only after hearings, and are enforceable only through decrees of circuit courts of appeals, and are subject to appeal in precisely the same manner as the orders issued under the various provisions of the Clayton act. Since local price discriminations, tying contracts, and factors' agreements, when they tend to suppress competition, are unquestionably "unfair methods of competition in commerce," the Trade Commission act overlaps the Clayton act to this extent, and makes the special prohibition of these particular practices quite unnecessary.

But unfair competition includes other things as well. The use of bogus competitive companies, espionage of competitors' businesses, coercion in various forms, blacklists and whitelists, the securing of railroad rebates and kindred favors—these and other practices have been used in the suppression of competition and have been held to be evidence of monopolistic intent in cases brought under the Sherman act.¹ So far as such methods are used in connection with an endeavor to establish monopoly, they are illegal under that statute. Or, more accurately, they are held to be part and parcel of a scheme, an effort, or an achieved result, which, taken as a whole, is itself illegal. Where such practices are found to have been used in this illegal way their continuance is often enjoined in the courts' decrees.

So far as this general aspect of unfair competition is concerned, the Trade Commission act, like the Clayton act, adds nothing to the older statute except a new form of procedure. There is the

¹ For a good account of the various forms of unfair competition which have figured in such cases see William S. Stevens, "Unfair Competition," *Political Science Quarterly*, XXIX (June, September, 1914), 282, 460.

difference, however, that it makes specific practices illegal,¹ while the Sherman act condemns the general purpose of the combination which utilizes such practices. This difference is probably not of much practical consequence. In passing upon the validity of orders of the Commission against unfair practices, in cases where the element of monopolizing is present, the courts will of necessity fall back upon precedents established in cases under the Sherman law. There is of course a possibility that there may come to be some broadening of the notion of what constitutes unfair competition as a phase of monopolizing; but, on the other hand, not all of the practices now reached by the Sherman act can be made to appear as unfair methods of competition when isolated and detached from the general business schemes of which they are parts.² If in some cases the new procedure will make it possible to reach the monopolizing process in its early stages, much will have been gained. But it is not to be expected that all monopolistic combinations can be dealt with effectively in this way. There will still be a field for the Sherman act.

The prohibition of unfair methods of competition in commerce is not, however, limited to cases in which the use of such methods may tend to establish a monopoly. In this respect the Trade Commission act differs from the Clayton act. The Trade Commission is virtually empowered to establish, through such of its orders as commend themselves to the courts, definite standards of fair competition for all business undertakings engaged in interstate and

¹ They are made illegal, but not criminal, for no penalties are provided.

² In the "naval stores case" (*Nash v. United States*, 229 U.S. 373), in which an indictment for a conspiracy to monopolize trade by means of various unfair practices was sustained by the Supreme Court, the defense maintained that the individual acts contemplated were not in themselves illegal. Justice Holmes, delivering the opinion of the court, said: "As to the suggestion that the matters alleged to have been contemplated would not have constituted an offense if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once. Of course this fact calls for conscience and circumspection in prosecuting officers, lest the unfounded charge of a wider purpose than the acts necessarily import convert what at most would be small local offenses into crimes under the statutes of the United States."

foreign commerce. This may easily prove to be the most important innovation in the new legislation. The full significance of this provision does not seem to have been brought out in the debates in Congress, where most of the emphasis appears to have been put upon its bearing on the trust problem. In the debates "unfair competition" was more than once identified with "restraint of trade." But this definition of unfair competition cannot be squared with what precedents there are for the interpretation of the two phrases, although undoubtedly the two overlap to some extent.

In a large sense, of course, every general statute regulating the conditions under which business is carried on helps to fix a level for competition. It has always been recognized that labor laws, pure-food laws, and laws providing for public supervision of weights and measures, although primarily for the benefit of employees or consumers, have also an important effect in weakening the power of unscrupulous competitors. Furthermore, the whole body of law affecting the relations between business men and those with whom they have dealings goes far to establish the rules under which competition must be conducted. But the law of unfair competition, taken in a narrower sense, bears directly upon the relations between business men as competitors; that is, upon the methods and practices used to gain trade. It establishes the lines beyond which one cannot go in the attempt to divert trade from one's competitors. Lacking statutory definition,¹ it comprises a variety of things found in different branches of the law. Combinations or conspiracies to injure or destroy a competitor's trade by the use of methods that would in themselves be legal, save for the fact of the combination or conspiracy, are, for example, to be put under this general head. And the employment of ordinary forms of competition by a combination or even by an individual may be held to be illegal if inspired by the malicious purpose of injuring a particular undertaking and if not designed to promote the legitimate interests of

¹ The "unfair competition" statutes found in a number of the states relate only to price discriminations. They are in general similar to the provisions of the Clayton act bearing upon the same matter, except that the state laws apply to all price discriminations made with the intent to injure a competitor, even where there is no purpose to establish a monopoly. These statutes are reprinted in *Laws on Trusts and Monopolies*, compiled by Nathan B. Williams for the use of the House Judiciary Committee (Washington, 1914).

the persons employing such methods.¹ These common-law doctrines have a wider application than that suppression of competition or "monopolizing" which is condemned by the Sherman act, for they do not involve the necessity of showing an intent to monopolize. Not the prevention of monopoly, but the protection of the individual business undertaking, is their controlling purpose. The kind of competition which they condemn need not have for its objective the establishment of monopoly; it is sufficient if its direct and primary purpose is to injure or destroy.

Then there is the very different sort of competition which is condemned, not because of its general purpose, but because of the methods which it employs. Inducing a competitor's customers to break their contracts with him is a case in point.² But more important are such things as libelous statements and fraudulent misrepresentations. By far the largest number of cases in the general field of the law of unfair competition have to do with fraud, and more especially with methods calculated to enable the offender to trade upon the established good will of a competitive undertaking. The use of trade-marks, brands, firm names, packages of a particular form or appearance, etc., for the purpose of misleading the consumer in respect to the identity of the firm or the origin of the goods is the most common offense of this sort.³

I have made this cursory and incomplete review of the general meaning of "unfair methods of competition" merely to suggest the extent to which the Trade Commission act seems to pass beyond what has been the accustomed province of anti-trust legislation. But it is none the worse on that account. Aside from the additional protection which the Commission's power in these matters will give to the rights of business men and of consumers, anything that will

¹ For a general review of the law on these points see Bruce Wyman, *The Control of the Market*, chaps. ii, iii, v. See also E. S. Rogers, "Predatory Price Cutting as Unfair Trade," *Harvard Law Review*, XXVII (December, 1913), 139.

² Wyman, chap. iii.

³ For an excellent popular account of these matters see E. S. Rogers, *Good Will, Trade Marks, and Unfair Trading* (Chicago, 1914). Mr. Rogers has discussed the same subject in a series of papers. See *Illinois Law Review*, III (April, 1909), 551; *Michigan Law Review*, VIII (June, 1910), 613; IX (November, 1910), 29; XI (March, 1913), 358.

raise the general level of competitive standards must be welcomed by those who believe in the retention of competition as a fundamental economic institution. Moreover, it is to be expected that the fact that the statute's condemnation of unfair competition is not made to depend on a proved purpose to create a monopoly will make it a more effective weapon against monopoly itself in its early stages. In this way it may prove a valuable supplement to the Sherman act.¹

It should not be imagined that the Commission will be able to create offhand a general code of definitions of unfair practices, or that it can make substantial additions to the existing law on the subject. Its orders are subject to review by the courts on all matters of law, and the courts will, of course, define "unfair methods of competition" in the light of existing judicial precedents. The law will grow, as other laws grow, only as individual cases with new characteristics are brought under it. But as to the wisdom of the general policy it embodies there can be, I imagine, no difference of opinion.²

The duties of the new Federal Trade Commission are not limited to issuing orders against the use of unfair methods of competition. Composed of five members holding office for seven

¹ While only a few countries have taken a position as definitely opposed to industrial combination as has the United States in the Sherman act, a number of countries have preceded us in adopting statutory declarations against unfair competition. A thing very commonly prohibited is the factors' agreement in its various forms. See, for example, the statutes of Australia, New Zealand, and Canada, reprinted in Williams' *Laws on Trusts and Monopolies*. The recent comprehensive statutes of Germany (1909) and Denmark (1912) relating to unfair competition are reprinted in Hearings before the House Committee on the Judiciary, 63d Congress, 2d session, on Trust Legislation, pp. 1491, 1495. The most interesting departure in both statutes is the careful limitation and regulation of price-cutting "sales." An account of the operation of the German law is given in a British consular report (Cd. 6006-2). For a fuller analysis see A. Pinner, *Gesetz gegen den unlauteren Wettbewerb* (Berlin, 1910). The latest account of the general status of the law of unfair competition in continental Europe is Charles Chenevard's *Traité de la concurrence déloyale* (2 vols., Geneva and Paris, 1914).

² It is possible that either the Commission or the courts will refuse to give so broad a meaning as I have suggested to the phrase "unfair methods of competition." But it can hardly be expected that it will not be held to cover much more than the types of unfair competition which have figured in cases under the Sherman act.

years and receiving salaries of \$10,000 each, it falls heir to the corps of employees and the unfinished tasks of the Bureau of Corporations.

That Bureau, established by Act of Congress in 1903 in the Department of Commerce and Labor, was authorized "under the direction and control of the Secretary of Commerce and Labor" to investigate the transactions of any corporation or combination engaged in interstate commerce, with the exception of common carriers. Its powers in the way of compelling testimony and the production of books and papers were identical with those of the Interstate Commerce Commission. It was also authorized to gather and publish "useful information" concerning corporations engaged in interstate commerce. The primary purpose of its special investigations of particular corporations and combinations, as stated in the statute creating it, was "to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of commerce," and the President might decide what part of its information should be made public. Established at the behest of President Roosevelt, it was to be an arm of the executive rather than of the legislative or judicial branch of the government. In addition to performing the duties with which it was legally charged, it has co-operated with the Department of Justice in various ways, and some of its investigations have been undertaken at the special authorization of Congress.

The new Commission is not a bureau of any department, but has an independent status, like that of the Interstate Commerce Commission. Some of its work, however, is as a virtual auxiliary of the Department of Justice. At the request of the Attorney-General it is to investigate any corporation alleged to be violating the anti-trust laws, and to make recommendations for the readjustment of its business. This is a wise provision for informal adjustments like those which are so important a part of the work of the Interstate Commerce Commission. In suits in equity brought under the anti-trust acts the Commission may be asked by the court to prepare an appropriate form of decree, which is, of course, subject to rejection or change by the court. The importance of

this provision is in its bearing upon the outcome of dissolution proceedings under the Sherman act. Since the American Tobacco case, it has been recognized that the drafting of a wise plan of reorganization for an offending combination may be an exceedingly difficult matter, requiring not only care and judgment, but also a large amount of technical information about the general conditions of the industry affected. Furthermore, the Commission is authorized to make investigations of the manner in which decrees in suits under the anti-trust acts are carried out. This provision should add much to the efficiency of the operation of the Sherman act.

Like the former Bureau of Corporations, the Commission may investigate and report upon the affairs of industrial and trading corporations engaged in interstate commerce, and it may be asked by the President or either House of Congress to report upon any alleged violation of the anti-trust acts. It has the further power to require annual or special reports from interstate corporations in such form and relating to such matters as it may prescribe. The information it obtains may be made public at its own discretion, "except trade secrets and names of customers." One effect of this provision, it may be hoped, will be to give students of corporation problems a very much more adequate body of authentic and apposite information than they have yet had. If the power to require the use of uniform accounting systems is later given to the Commission, the value of this information will be distinctly enhanced. The Commission's powers to secure the testimony of witnesses and the production of books and papers seem entirely adequate, and are similar to those of the Interstate Commerce Commission.

It is both difficult and hazardous to pass a general judgment upon legislation which comprises so many different provisions and which reaches into fields so new as do these two statutes. But unless the foregoing analysis is altogether mistaken the two cannot be joined for either praise or condemnation. The anti-trust sections of the Clayton act, in the opinion of the present writer, are bungling and generally futile. There is a chance that, at the worst, they may make enough trouble to delay the enactment of the badly needed federal statute dealing thoroughly and systematically with

the promotion, organization, and management of corporations engaged in interstate commerce. At best, so far as I can see, they will be ineffective. The Federal Trade Commission act is a statute of a very different type. It introduces a method of dealing with the admitted evils of unfair competition modeled upon what has proved a successful method of dealing with railroad discriminations. The new machinery it furnishes for the enforcement of the Sherman act is of a kind which experience has shown to be needed. It makes a beginning, at least, in providing for adequate federal statistics of industrial corporations. I see no reason why it should not prove a highly serviceable addition to the nation's industrial code.

ALLYN A. YOUNG

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